

THE
CAMBRIDGE LAW JOURNAL

Vol. III.—No 2.

1928

MANDATES.¹

ARNOLD D. McNAIR.

The General Features of the Mandate System.

THE method adopted at the end of the World War for dealing with the colonies and territories of Germany and Turkey which it was decided to detach from them² is known as the mandate system, and is embodied in Article 22 of the Covenant of the League of Nations, which is an integral part of the treaties of peace with Germany, Austria, Bulgaria and Hungary.³ Under this system these detached territories are not in the ownership of any State, but are entrusted to certain States called 'Mandatory States' to administer on behalf of the League upon the conditions laid down in written agreements called mandates between the League and each mandatory. The system,⁴

¹ This brief outline of the mandate system will appear in the fourth edition of volume I of Oppenheim's *International Law*, to be published later in the present year, together with a bibliography, and is printed here by permission of Messrs. Longmans, Green & Co. The following abbreviations are used :—

Hall = Hall's *International Law* (8th ed. 1924), by A. Pearce Higgins.

Lawrence = Lawrence's *Principles of International Law* (7th ed. 1923), by P. H. Winfield.

B.Y. = *British Year Book of International Law*.

A.J. = *American Journal of International Law*.

R.I. = *Révue de droit international et de législation comparée*.

L.N. Off. Jo. = *League of Nations Official Journal*.

² The German case against the taking away of her overseas possessions and the mandate system will be found in Schnee, *German Colonization, Past and Future* (1926).

³ As regards Turkey, see Article 16 of the Treaty of Lausanne, 1923.

⁴ But not the word: see Keith in *Journal of Comparative Legislation*, 3rd ser. vol. iii (1921), pp. 327—329, and Wright in *A.J.* xvii (1923), at p. 694.

which was proposed by General Smuts, is a novelty in International Law, and although the term 'mandate' suggests certain analogies in private law,⁵ it is doubtful whether much practical help in the understanding and application of the system can be derived from these sources.

What an English lawyer would call the 'documents of title' are the following:—

(a) Article 119 of the Treaty of Versailles,⁶ whereby 'Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions'—not, it will be noticed, in favour of the League; (b) Article 16 of the Treaty of Lausanne of 1923, superseding Article 132 of the unratified Treaty of Sèvres, whereby Turkey 'renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present treaty . . . the future of these territories being settled or to be settled by the parties concerned'—the treaty not specifying in whose favour the renunciation was made, but presumably contemplating the States then in occupation of those territories; (c) Article 22 of the Covenant, which defines the terms upon which the Allied Powers, who signed and ratified the Peace Treaties and as victors could all claim some interest in the future of the territories acquired from their enemies, assented to the disposition and government of those territories, and entrusted to the League the supervision of the scheme embodied in that article; (d) the mandates, each of which defines the terms upon which the mandatory has agreed with the Council of the League to advise and assist or to govern, as the case may be, the 'community,' or 'people,' or 'territory' entrusted to his care.⁷

First, the question is sometimes asked, Wherein does the mandate system differ from the old-fashioned annexation which was a frequent result of a war ending in a preponderant victory? From the point of view of the dispossessed owners, there is little difference, except that if and when they are admitted to the League they take part in the measure of supervision which the

⁵ See Winfield in Lawrence, § 43; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), § § 84—86; Lee, *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law* (1921); Goudy in *Journal of Comparative Legislation*, 3rd ser. vol. i (1919), pp. 175—182; Potter in *American Political Science Review*, November, 1922; Evans, *Some Legal and Historical Antecedents of the Mandatory System* (Texas) (1924).

⁶ See also the following articles (amongst others), 120 to 127, 257.

⁷ Of both (c) and (d) it may be said, without importing 'the refinements of the courts in (to) the rough jurisprudence of nations' (Hall, p. 395 n.) that their interpretation and their working demand the application of the rule of *ultra vires*. This is substantially recognized as to the Palestinian Mandate by the British Privy Council in *Jerusalem-Jaffa District Governor v. Suleiman Murra*, [1926] A. C. 321.

League exercises over the working of the system, and also become entitled to participate with other members of the League in the benefits of the 'open door' as to trade and commerce which the 'A' and 'B' mandatorys undertake to secure.⁹ From the point of view, however, of the mandatory and of the inhabitants of the mandated area, there is a substantial difference from annexation, as the mandatory is precluded by the terms of the mandate from doing a number of things which an owner of territory can lawfully do. That Germany and Turkey have divested themselves of all rights of ownership in the mandated areas is clear.¹ That the mandatorys have not acquired all of those rights is equally clear; for (i) by the terms of the mandates they agree to exercise their mandates on behalf of the League, and the mandates, at any rate, contain no cession of the territory to the mandatory; (ii) the mandatory has no power without the consent of the Council of the League to annex, cede² or otherwise dispose of the mandated territory; (iii) he is subject to varying restrictions as to the recruiting and training of the inhabitants, so that, for instance, in the case of the 'B' and 'C' mandates, the mandatory may not train the natives except for the purpose of internal police and local defence,³ and may not establish military or naval bases⁴; (iv) the inhabitants do not *ipso facto* acquire the nationality of the mandatory⁵; (v) economically, he is under an obligation, at any rate in the case of the 'A' and 'B' mandates, to adopt the policy of the 'open door,'

⁹ Japan claims that the same principle should apply to the 'C' Mandates: see Baty in *B.Y.* 1921-1922, pp. 109-121, and see *A.J.* xvii (1923), Supplement, p. 163.

⁹ As to the rights of non-members of the League and their nationals, see below, p. 157.

¹ See below, p. 158. Note on Sovereignty in Relation to the Mandates.

² See, for instance, the transfer from the British mandate to the Belgian mandate of a portion of Ruanda in East Africa at the instance of the Council of the League: *L.N. Off. Jo.* November, 1923, p. 1273.

³ Note that Article 3 of the French mandates for the Cameroons and for Togoland contains the following addition which does not appear in the corresponding British mandates for the Cameroons and for Togoland: 'It is understood, however, that the troops thus raised may, in the event of general war, be utilized to repel an attack or for defence of the territory outside that subject to the mandate.'

⁴ The difficult question whether a mandated area automatically falls within the region of war when its mandatory is at war must probably be answered not in general terms but with reference to the actual degree of control exercised over the mandated area in each case. It is arguable that to involve a mandated area in its mandatory's wars is so contrary to the whole intention of Article 22 of the Covenant that no belligerent who is bound by that article could insist upon treating the mandated area as within the region of war; but such a course would carry with it an undertaking on the part of the mandatory not to make use of his mandated area for warlike purposes, which some of the mandates permit him to do, for instance, Article 17 of the Palestinian and Article 2 of the Syrian mandate, and Article 3 of the French Cameroons and Togoland mandates: see Lewis in *Law Quarterly Review*, xxxix (1923), pp. 458-475.

⁵ See below, p. 155, as to Nationality.

that is, he must ensure to the nationals of all States members of the League the same rights in respect of commerce and trade as are open to the nationals of the mandatory.

Secondly, the dominant element is that of trusteeship for the inhabitants of the mandated area, 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world,' coupled with the implication, at any rate in the case of the 'A' mandates, that it is the duty of the mandatory to assist them in their development towards 'being able to stand by themselves.'

Thirdly, the mandate system is under the supervision of the Council of the League, advised and assisted by the Permanent Mandates Commission.⁶ This Commission consists of ten ordinary members and one extraordinary member, and the majority of the members must be nationals of States which are not mandatories.⁷ The annual reports which the mandatories are bound to make upon their administration are examined by this Commission in the presence of a representative of the mandatory State, who answers questions and supplements the information contained in the report. The right of the inhabitants of a mandated area to petition the League is recognized. Their petition must be forwarded through the Government of the mandatory State in order to enable it to attach its own comments before the petition is examined by the Commission. Petitions from other sources are communicated to the mandatory State for the same purpose.⁸ The Commission reports to the Council of the League, with whom rests the main responsibility for the working of the system, but the Assembly is also free to discuss questions arising out of it. The publicity and the exchange of information resulting from the annual reports and their public examination by the Commission will in course of time create new and higher standards of colonial administration than have prevailed in the past in certain parts of the world. The main sanction for the observance of the terms of the mandates is the public opinion of the members of the League, but the several mandates, being treaty obligations, possess the sanctity attached by International Law thereto, and are supported by the League's right of intervention to secure their observance.⁹

⁶ See Van Rees, *Les mandats internationaux* (1927), pp. 56—141; M. Van Rees is the Vice-President of the Commission.

⁷ A German subject was appointed a member in September, 1927.

⁸ There is no provision for the reference of a petition to the Permanent Court, but it has been suggested that this could occur if some other member of the League were prepared to take up the question, which might then become a dispute between that member and the mandatory.

⁹ All the mandates contain a clause which provides that the mandate cannot

The Different Types of Mandate.

The following clauses of Article 22¹ of the Covenant indicate, in descending order of political individuality, the three types of mandate²:—

Type A.—‘Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.’

The ‘A’ mandates were distributed³ and accepted by the mandatories as follows:—

Iraq⁴—Great Britain.

Palestine—Great Britain.

Syria and Lebanon—France.

be modified without the consent of the Council of the League. Whether or not a mandate can be revoked by the Council on the ground of a substantial breach of its terms is controversial; regarded as an agreement, principle would seem to demand that it could be terminated by one party (for instance, the Council of the League) on the ground of substantial breach by the other, but it is something more than an agreement because it accompanies and conditions a transfer of certain rights in regard to the mandated territory itself. The Council has already assented to a rectification of a frontier (the Ruanda frontier in East Africa) which involved the transfer of a portion of a mandated area from one mandatory to another, and there would appear to be no reason in principle why a mandatory should not with the consent of the Council be able to transfer its mandate to another State.

¹ Which, as Baty in *B.Y.* 1921–1922, at p. 119, remarks, ‘was drafted with a high regard for Mr. Wilson’s supposed announcement that “he did not want a lawyer’s treaty.”’

² The different words employed in each case are not without significance: ‘communities,’ ‘communautés,’ (‘A’ mandates); ‘peoples,’ ‘peuples’ (‘B’ mandates); ‘territories,’ ‘territoires’ (‘C’ mandates).

³ The distribution of the mandates (‘A,’ ‘B,’ and ‘C’) was effected by decisions of the Principal Allied Powers which were communicated to the Council of the League and are recorded in the preambles of the mandates.

⁴ The position of Iraq (Mesopotamia) is peculiar and may be summarized as follows: By Article 16 of the Treaty of Lausanne, Turkey renounced ‘all rights and title whatsoever’ over it, and agreed that its future should be settled by ‘the parties concerned.’ Great Britain had already agreed in 1920 to accept a mandate for it, and a draft mandate was prepared. In 1922 Great Britain and Iraq entered into a treaty of alliance which was to last, as modified by a Protocol of 1923, for four years. In 1924 Great Britain represented to the League that Iraq had already ‘advanced too far along the path laid down in Article 22 of the Covenant for a mandate to be appropriate,’ and the Council accordingly approved the treaty of alliance and certain further undertakings by Great Britain as giving effect to Article 22 of the Covenant, thus virtually substituting the treaty for the draft mandate which never came into force (Cmd. 2317 of 1925). In 1926, as a condition of the Council of the League’s award (Cmd. 2562 of 1925) on the Turco-Iraq frontier question, Great Britain was invited by the Council to submit a new treaty with Iraq, ensuring the continuance for twenty-five years of the mandatory *régime* defined by the treaty of alliance (Cmd. 2370 of 1925) and of the British Government’s undertaking approved by the Council (Cmd. 2317 of 1925), unless Iraq should be admitted as a member of the League before the expiration of this period. This treaty of alliance was made on January 13, 1926 (Cmd. 2587 of 1926), and approved by the Council of the League on March 11, 1926 (*L.N. Off. Jo.* 1926, p. 503). Finally, on

Type B.—‘Other peoples, especially those of Central Africa, are of such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases, and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.’

The ‘B’ mandates were distributed and accepted by the mandatories as follows:—

British Cameroons—Great Britain.

French Cameroons—France.

British Togoland—Great Britain.

French Togoland—France.

Tanganyika—Great Britain.

Ruanda Urundi—Belgium.

Type C.—‘There are territories such as South-West Africa and certain of the South Pacific Islands which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.’

The ‘C’ mandates were distributed and accepted by the mandatories as follows:—

South-West Africa—Union of South Africa.

Samoa—New Zealand.

Nauru—British Empire (Great Britain, Australia and New Zealand jointly).

Other Pacific Islands south of the Equator—Australia.

Pacific Islands north of the Equator—Japan.⁵

December 14, 1927, a new treaty of alliance (Cmd. 2998) was made between Great Britain and Iraq ‘on terms of equality,’ replacing the two above-mentioned treaties; by this treaty Iraq is recognized ‘as an independent sovereign State,’ and undertakes to accede to a large number of international agreements; the contracting parties will ‘consult in all matters of foreign policy which may affect their common interests’; and ‘provided the present rate of progress in Iraq is maintained and all goes well in the interval,’ Great Britain ‘will support the candidature of Iraq for admission to the League of Nations in 1932’; upon its admission to the League the treaty will be reviewed. Thus Iraq is something more than a ‘mandated area’; its status is more akin to that of a Protected State, with this difference from other Protected States, that the relationship of protection follows ‘the principles of Article 22 of the Covenant’ and is subject to the supervision of the League to which the protector makes reports for examination by the Permanent Mandates Commission. There is a distinct Iraqi nationality; Iraqi nationals are protected by Great Britain in countries in which the King of Iraq is not diplomatically represented, and Great Britain is represented in Iraq by a High Commissioner. See Davidson, *The Constitution of Iraq*, in *Journal of Comparative Legislation*, 3rd ser. vol. vii (1925), pp. 41—52.

⁵ A mandate in respect of Armenia was offered to the United States of

National Status of the Inhabitants.

Article 22 of the Covenant does not directly touch the question of the national status of the inhabitants, but it was inevitable that this question should arise. It is convenient to ask ourselves two questions: (1) Have the inhabitants lost their former German or Turkish nationality? (2) If so, have they acquired any new nationality?

(1) The normal effect of cession is twofold, namely, to divest the subjects of the ceding State of their nationality (at any rate when domiciled within the territory ceded), and to invest them with the nationality of the new sovereign.⁶ But the clauses of the treaties already quoted, whereby Germany and Turkey renounced their rights in respect of the territories now under mandate, suggest a dereliction rather than a cession⁷; and it seems that the effect of these clauses is to divest the inhabitants of these territories (apart from the special case of the German subjects of European origin⁸) of their former German or Turkish nationality and not to invest them automatically with any new nationality. In April, 1923, the Council of the League adopted certain resolutions⁹ with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which is that

America, but was not accepted. Armenia is now a Socialist Soviet Republic, forming part of the Transcaucasian Socialist Federal Republic, which is a member of the Union of Socialist Soviet Republics. Brown in *A.J.* xiv (1920), pp. 396—398; International Conciliation Pamphlet, No. 151 (June, 1920). A mandate for Cilicia was offered to France and refused. Cilicia after being for a time in French occupation remains a part of Turkey.

⁶ See Hall, §§ 205, 206.

⁷ See *R. v. Jacobus Christian* in the Appellate Division of the Supreme Court of South Africa in 1923, summarized by Mackenzie in *B.Y.* 1925, pp. 211—219, Matthews in *Journal of Comparative Legislation*, 3rd ser. vol. vi (1924), pp. 245—254, and Emmett, *ibid.* vol. ix (1927), p. 117. As to the bearing of this decision on the question of sovereignty, see below, p. 158, Note on Sovereignty.

⁸ Article 122 of the Treaty of Versailles appears to assume the continuance of the German nationality of German subjects of European origin in mandated areas—a view which is strengthened by the minutes of the Permanent Mandates Commission, Second Session (cited by Wright in *A.J.* xviii (1924), at p. 313), and was assumed to be correct in the negotiations between the Governments of the Union of South Africa and of Germany preceding the automatic and collective naturalization Act of 1924 (see Emmett, *supra*, pp. 111—122, and *B.Y.* (1925), pp. 188—191).

⁹ *L.N. Off. Jo.* (1923), p. 604. (i) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory Power and cannot be identified therewith by any process having general application.

(ii) The native inhabitants of a mandated territory are not invested with the nationality of the mandatory Power by means of the protection extended to them.

(iii) It is not inconsistent with (i) and (ii) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the mandatory Power in accordance with arrangements which it is open to such Power to make with this object under its own law.

(iv) It is desirable that native inhabitants who receive the protection of the mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate.

they have a distinct status from that of the mandatory's nationals and, while not disabled from obtaining individual naturalization from the mandatory, do not automatically become invested with its nationality. The Council having no power to make law, these resolutions must be regarded rather as an opinion and a direction entitled to great weight than as juridical propositions, but it is generally accepted that they embody the correct doctrine. In the case of the 'C' mandated area of South-West Africa, the mandatory, with the consent of the Council of the League and with the assent of the German Government, passed legislation offering collective naturalization to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them.¹

(2) Have the inhabitants of the mandated areas acquired any new nationality? If so, what is it? These questions can only be answered by an examination of the terms of the particular mandate and of the other relevant circumstances. It may be accepted that in no circumstances have the inhabitants *ipso facto* acquired the nationality of the mandatory. It does not necessarily follow that they have acquired any nationality at all; for, in our opinion, the creation of a new nationality could only be the act of a mandated area well advanced on the road to statehood. Such a creation has, in fact, taken place in the case of all the 'A' mandates; in Iraq, as the result of the Iraq Law of October 9, 1924; in Palestine, where by a British Order in Council of July 24, 1925, Palestinian 'citizenship'² has been created³; and in Syria and Lebanon, in which case the existence of a distinct nationality is recognized by Article 3 of the mandate, and has been established by decrees of the French High Commissioner.⁴ On the other hand, the 'B' and 'C' mandated areas cannot be said yet to have minted a nationality of their own, and we must be content to say that the native inhabitants of those areas have a status which is distinct from their former German or Turkish nationality and from the nationality of their mandatory, but does not yet amount to full nationality itself.⁵ It is believed that in all cases, including even Iraq,⁶ the mandatory is responsible for the diplomatic

¹ Act 30 of 1924, see Emmett, *op. cit.* and B.Y. (1925), pp. 188—191.

² Which is equivalent to nationality, see Bentwich, B.Y. (1926), at p. 102.

³ But as to Transjordan, see Bentwich, *op. cit.* at p. 106.

⁴ For details in all three cases, see Bentwich, *op. cit.* at p. 106.

⁵ For instance, as Lewis, *op. cit.* at p. 471, points out, the inhabitants of Samoa under the mandate of New Zealand have been described in legislation affecting them as 'natives of Samoa entitled to British protection.'

⁶ See below, p. 153, n. 4, as to Iraq. Great Britain only affords diplomatic protection to nationals of Iraq in those countries in which the King of Iraq has no diplomatic representative.

protection⁷ of the inhabitants of a mandated area when they are outside their home territory and not in that of the mandatory.

'Third States' and the Mandate System.

The expression 'third States' is not strictly logical, but will conveniently denote States other than the mandatory. They are either members of the League or not. (a) States which are members of the League are thereby consenting parties to the mandate system. In the case of the 'B' mandates, Article 22 of the Covenant stipulates for equal opportunities for the trade and commerce of other members of the League, and similar, but not identical, provisions are contained in the 'A' mandates. The 'C' mandates contain no such provisions—a fact which evoked an emphatic protest from Japan.⁸ (b) As regards States which are not members of the League, the basic fact is that the Covenant and the mandates are *pacta quae tertiis nec nocent nec prosunt*, and it is not open to a group of States to create a new international institution and then to demand that other States should recognize it.⁹ It is mainly with the United States of America that questions upon the relationship of States not members of the League to the mandate system have arisen, and that country has entered into a number of treaties with the mandatory States securing for herself and her nationals the same rights in the mandated areas as those of States members of the League and their nationals.¹

⁷ There are a number of instances of one State granting diplomatic protection to the nationals of another, see Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 463—478, 568—574, cited by Wright in *A.J.* xviii (1924), p. 311. As to the native inhabitants of the former German overseas possessions, see Article 127 of the Treaty of Versailles.

⁸ All the mandates contain a clause which provides that any dispute between a mandatory and a member of the League which cannot be settled by negotiation shall be referred to the Permanent Court of International Justice: see the *Mavrommatis Palestine Concessions Case*, Publications of the Court, Series A, No. 2. Is this right of bringing a dispute with a mandatory before the Court only available when the interests of the other party or its nationals are affected, or can it be used altruistically by a member of the League having no such interests to protect, but merely seeking the faithful observance of the terms of a mandate?

⁹ See Wright in *A.J.* (1924), pp. 786, 787, and in *Michigan Law Review* (1925), pp. 717—747.

¹ For instance, with Great Britain: Palestine, *A.J.* xx (1926), Supplement, pp. 65—72; East Africa, Cameroons, Togoland, Treaty Series, Nos. 22, 23, 24 (1926); *A.J.* xx (1926), Supplement, pp. 166—177; with France, Cameroons and Togoland, *A.J.* xviii (1924), pp. 786—787, and Supplement, pp. 189—196; Syria and Lebanon, *A.J.* xix (1925), Supplement, pp. 1—5; with Japan, Gregory in *A.J.* xv (1921), pp. 419—427, and *ibid.* xvi (1922), pp. 248—251. As regards the German possessions the United States of America could perhaps claim that, although she took no interest by cession or otherwise under Article 119 of the Treaty of Versailles, she had as a participant in the war a certain interest in the disposition of those possessions, see Cmd. 1226 of 1921. See International

Note upon Sovereignty in Relation to the Mandates.

Widely differing views are held upon the question, Where does sovereignty in respect of the mandated areas lie? The following are among the numerous answers that have been given, setting on one side Iraq, whose position, as we have seen, is peculiar: (i) *In the mandatory*, see Rolin in *R.I.* 3rd ser. vol. i (1920), pp. 329—363, and Lindley, *Acquisition and Government of Backward Territory*, pp. 263—267, and *R. v. Jacobus Christian* (above, p. 155, n. 7), where the Appellate Division of the Supreme Court of South Africa held that the mandatory Government, that is, the Government of the Union of South Africa, had sufficient internal *majestas* to support a conviction of one of the inhabitants of the 'C' mandated area of South-West Africa for high treason under Roman-Dutch common law. That sufficed to uphold the conviction, but the judgments are also cited in support of the theory of full sovereignty in the mandatory. With reference to the claim of General Hertzog, Prime Minister of the Union of South Africa, for full sovereignty in respect of the mandated area of South-West Africa subject to the terms of the mandate, see the London *Times* newspaper of June 9 and August 13, 1927, the Minutes and Report of the Tenth Session (1926) of the Permanent Mandates Commission, pp. 82—86, 182, and of the Eleventh Session (1927), and Minutes of the Council meetings of March and of September, 1927, *L.N. Off. Jo.*, x (1927), pp. 347 and 1118—1120; *Round Table*, December, 1927, pp. 217—222. The preamble of a boundary treaty (*British Treaty Series*, No. 29 (1926)) between the Union of South Africa and Portugal dated June 22, 1926, recites that the Government of the former 'possesses sovereignty over the territory of South-West Africa . . . lately under the sovereignty of Germany.' (ii) *In the mandatory*, 'acting with the consent of the Council of the League'; see Wright in *A.J.*, xvii (1923), pp. 691—703; *ibid.*, xviii (1924), pp. 306—315; *ibid.*, xx (1926), pp. 768—772. (iii) *In the Principal Allied Powers*. (iv) *In the League* (see Lauterpacht, *op. cit.* § 86, while admitting that the exercise of sovereignty rests with the mandatory; see *In re Ezra Goralshvik*, mentioned in *A.J.*, xx (1926), p. 771; Redslob, *La théorie de la Société des Nations* (1927), pp. 196, 197; Corbett in *B.Y.*, 1924, at p. 134, divides sovereignty between the mandatory

Conciliation Pamphlets, Nos. 166 (1921) and 213 (1925); and see Declaration of December 13, 1914, accompanying the Washington Four Power Treaty relating to the Pacific: Cmd. 1627 of 1922.

and the League). (v) *In the inhabitants of the mandated area.* (vi) *In the last-named, but at present in suspense*, in much the same way as the full legal capacity of a person not *sui iuris* may be temporarily in suspense, while the exercise of certain powers on his behalf is confined to a tutor or guardian (see Stoyanovsky, *Le théorie générale des mandats internationaux* (1925); Pic in *Revue générale de droit internationale public*, xxx (1923), pp. 321—371). This list by no means exhausts the variety of opinions which have been expressed.

We incline to the view that very little practical help is obtainable by attempting to apply existing conceptions of sovereignty to such a novel state of affairs as the mandate system presents. We have already enumerated some of the respects in which the administration of a mandated area differs from the ownership of territory. For some, but not all, of the limitations and restrictions upon the powers of the mandatory parallels could be found in the State servitudes recognized by many writers, and subjection to numerous and onerous servitudes is not considered to be inconsistent with State ownership and sovereignty. But if, as we submit, the restrictions placed upon a mandatory are such that he cannot fairly be described as having ownership or territorial supremacy or, more simply, as having all the 'rights and titles' which Germany and Turkey had in these territories, where are we to seek for the residue of the rights in regard to the detached territories which were formerly vested in Germany and Turkey? (i) The 'A' mandated areas, Palestine and Syria with Lebanon (Iraq is a special case, see above, p. 153, n. 4), are on the way towards acquiring many, and eventually, it is to hoped, all, of the rights of State ownership and statehood, but it cannot be said that at present the residue referred to lies with them. Still less could the residue be attributed to the 'B' and 'C' mandated areas, for it is only international persons that can own international rights, and neither the 'B' and 'C' areas nor their inhabitants can, at present at any rate, be called international persons. This is one reason why the editor finds difficulty in accepting the theory of Pic and Stoyanovsky, *op. cit.*, which attributes 'virtual sovereignty' to the inhabitants of the mandated territories, but regards it as being at present in suspense pending their emergence from pupilage. (ii) Nor can this residue be attributed, in the case of the former German possessions, to the Principal Allied Powers, nor, in the case of the former Turkish possessions, to Great Britain and France, in their own right and independently of their mandates, as being perhaps, together with Iraq,

the 'parties concerned' of Article 16 of the Treaty of Lausanne. (Was the League also a party concerned?) The Palestine and the Syria with Lebanon mandates came into operation on September 29, 1923. There may well have been a moment of time at which ownership (subject to Article 22 of the Covenant) vested in the Principal Allied Powers in the case of the German possessions and in Great Britain and France in the case of the Turkish possessions, but that moment passed when they accepted their mandates. (iii) There remains by a process of elimination the League of Nations. Can it be said that the residue of the bundle of rights, powers and interests which habitually make up State ownership of a territorial supremacy over a given unit of territory vests in the case of the mandated territories in the League? That the League is legally capable of the function of holding and exercising such rights, titles, powers and interests must, it is admitted, be granted (see the case of the Saar, and Corbett in *B.Y.*, 1924, pp. 126—136). Whether it does in this case hold and exercise them or not is another matter.

The conclusion of this controversial matter which commends itself to us is this: that the rights, powers and interests which make up the relationship of the normal State towards its territory and the inhabitants belong in the case of the mandated areas in part to the mandatory, while the remainder are reserved to the League, the proportions varying with each group of mandate, according to the terms of the mandates and sometimes within each group. Thus a mandatory can, within the terms of the mandate, legislate for the mandated area, but could not without the consent of the Council of the League transfer any portion of the area to another mandatory. The use of the term 'sovereignty' has been avoided on account of its ambiguity. But if by 'sovereignty' is meant the bundle of rights, powers, and interests which, let us say, Great Britain has over Kent or France over Calais, then we may say either that sovereignty is divided between the mandatory and the League or that it resides in 'the mandatory acting with the consent of the Council of the League'; to us it does not seem to matter much which. (In theory it seems possible that if a mandatory wearied of well-doing and renounced his mandate, the League might find itself with a mandated area 'in hand' and might administer it until a 'new tenant' could be found, much as it administers Danzig.)

THOUGHTS ABOUT THE COMMON LAW.¹

THE RIGHT HON. SIR JAMES O'CONNOR.

AS a man gets on in life he is frequently led to wonder whether his early and immature conceptions have any counterpart in the minds of the wiser young generation of to-day. At this moment I am wondering if any of you have ever thought about the Common Law of England as I did when I first made its acquaintance a good many years ago.

In a vague and hazy way it occurred to me that there must be somewhere in the realm of England a great well of law, to be found by the earnest searcher, into which he could dip his bucket, so as to get as much law, pure and undefiled, as he wanted for any given occasion; and in particular I imagined that this well or reservoir had existed for all time, and that no man knew the beginnings thereof. As the result of an experience which was sometimes painful but always salutary, that fancy left me; but my thought processes on the subject have suggested to me that I can usefully occupy a little of your time by explaining what the Common Law of England is, what was its origin, and how it came to be developed into the imposing structure it is to-day.

There was some truth behind my foolish conception. While the Common Law has not existed for all time, the same cannot be said of one of the elements to which it owes its existence. The instinct for truth and justice is innate in mankind; it is as old as the Creation. The strength of the instinct, to be sure, varies enormously. It is feeblest amongst savage and backward peoples. Education, experience, tradition, all the things that make for civilization tend to shape, vitalize and strengthen it. Nowhere does it reach a greater intensity than in this island, where so many factors—centuries of ordered liberty and peace, a sane and intelligent people, an educated ruling class—combine to make it one of the most potent forces—if not the most potent force—in the national life.

Yet that instinct by itself would not produce a first-class or even a tolerable code of law. The function of the law is not

¹ Read to the Cambridge Law Society, February 22, 1928.

merely to redress private wrong, but to establish principles upon which men may rely in the formulation of their contracts or in the conduct of any other sort of human activity. Consequently there is this necessary defect in every principle which the mind of man can conceive, that here and there, in extreme cases, it may work something like hardship or injustice. 'Hard cases,' it has been said, 'make bad law.' But the essential thing is to have a principle as clear, as precise, and as wide as possible, obedience to which will eliminate injustice in all but the most negligible number of cases. When, therefore, a novel case comes before a judge and, there being no authority to guide him, he has to lay down a principle, he has to keep in mind not merely the effect of his decision upon the parties to the suit, but its effect upon other possible disputants or other people standing in the same, or nearly the same, relation to each other as the parties to the suit. In other words, he has to consider the possible effects of his judgment upon the community.

This consideration, which is inherent in all our case law, appears very acutely in connexion with matters affecting what is known as public policy. It may be unjust as between the parties to refuse legal efficacy to a contract based upon an immoral consideration or in restraint of trade, but as against the particular injustice has to be reckoned the damage to the community if such contracts were capable of enforcement.

There must be brought, therefore, to the making of a good code of case law something more than the desire to do justice to the parties to the suit. Can we give a name to the sum of the ingredients that are necessary? Moulton L.J. (afterwards Lord Moulton) endeavoured to do so. 'Law,' he said, 'is the crystallized common sense of the community.' Common sense, it must be admitted, is hard to define. It suffers from its name. The intelligentsia, in particular, sniff scornfully at it—it is too plebeian for them. In truth it is an uncommon quality and is a very high form of intelligence. It implies a capacity to take in a subject in all its bearings, and not merely in some of them. The English people are the most common-sense people in the world. Other peoples (my own, I fear, included) will give you forty plausible reasons for arriving at a wrong conclusion. The English will arrive at a right conclusion, though they are indifferent, for the most part, as to the reasons that led them to it.

The instinct for truth and justice, however deep and intense, will not produce a good code of law. Nor will such instinct,

even though aided by common sense, unless there is something else as well. Without having read Moulton L.J.'s judgment, it flatters my vanity to recall that in 1921 my mind ran on lines parallel to his, when I said: 'Law is common sense reduced to rule by the trained intellects of our judges.'

A judge might have a very strong instinct for justice and a very strong common sense and yet make no contribution of value to our jurisprudence. He might decide correctly, but be unable to state the reasons or to state the correct reasons for his decision, or to formulate principles for the guidance of lawyers and the public. To have a first-class lawyer, you must have a first-class mind, operated upon by first-class training. You have both in this country. You have been very blessed by providence. You come from a bold and hardy stock; your geographical position is unequalled; your harbours are numerous and commodious; your soil is fertile; your climate is equable, though bracing; the bowels of the earth teem with riches. You have had and have a rich and, on the whole, a benevolent territorial aristocracy. You have had and have great industrial and commercial classes. The combination is unique. Such a community tends to produce great men. Especially does it tend to produce great lawyers. Your vast trade and commerce necessarily produce a frequency of dispute over matters which are chiefly, though by no means entirely, matters of contract. Your highly complex civilization embraces a complexity of human relations which must often seek solution or relief in the Courts. Controversies between one land magnate and another or between the landlord and his tenant furnish another great field for the activity of the lawyer. With big stakes in the pool the law must be, and it is, a highly paid, a highly honoured and a highly honourable profession, attracting the best intellects of the community, especially from sections of that community which are closely in touch with big-scale affairs and which can afford to give its sons—and now its daughters—a first-class education. So that we have in England all the elements necessary to make a great code of judge-made law—a deep-seated instinct for truth and justice; a great fund of common sense; a great field for its exercise; and a great body of highly-trained and highly-educated men to apply that common sense to every sphere of human activity and to enunciate for our guidance rules upon which we may safely act in the conduct of our lives. It is no wonder, then, that the English Common Law commands the admiration of the world.

The term 'Common Law' is usually applied to that portion

of our case law or judge-made law which is enunciated or administered in Courts other than the Courts of Equity. It seems to me almost a pity that the expression 'Common Law' was used at all. In my opinion, the evolution of case law in the Courts of Equity was precisely the same as in our Common Law Courts. For example, the law of specific performance is nothing but common sense crystallized in the chill atmosphere of a Chancery Court. Really what I am endeavouring to express this evening has reference to all case law.

A suitable national spirit makes good material; suitable judges make good workmen; let us see how the structure was built.

It will be convenient to take an illustration. Let us put ourselves in the position of the judges who had to try the question that arose between a Mr. Butterfield and a Mr. Forrester in 1809 (11 East, 60). It is not a very old case, but it is none the worse for that. I select it because it is a familiar case, as are the cases I propose to mention in connexion with it. You remember the facts of it. Forrester was repairing his house and in doing so most improperly left a pole across the road. Butterfield had a spanking horse which he was riding on the occasion in question. It was about dusk of an August evening. Butterfield galloped his horse as fast as he could, the paid came up against the pole, and Butterfield was injured. But if Butterfield had been going at a reasonable pace he would have seen the pole a hundred yards off and would not have run into it. Butterfield was held not entitled to recover, because the occurrence was at least as much his fault as the defendant's. This is the leading case on the law of contributory negligence. Some thirty years later a defendant sought to take advantage of it in the famous case of *Davies v. Mann* (1842) 10 M. & W. 546. In that case a careless or needy person put his donkey to graze on what is appropriately called in Kerry the 'long acre,' the grass along the broad highway. The defendant drove a wagon very fast; so fast, indeed, that he was unable to pull up in time to save the donkey, which, being fettered, was unable to get out of the way, even if it had the sense or the time to do so. The judges naturally held that the wagoner was to blame and should pay for the donkey, for, though the plaintiff was negligent himself, yet the real cause of the accident in this case was the furious and careless driving of the defendant. So far so good.

Later in 1849 came the interesting and novel case of *Thorogood v. Bryan* (1849) 8 C. B. 115. In that case a man was

killed owing to a collision between an omnibus, in which he was a passenger, and a vehicle driven by the defendant's servant. Both drivers were negligent, and neither could have succeeded against the other. The deceased's personal representatives, however, insisted that as he was in no wise negligent himself, and was merely a passenger in the omnibus, he could not be held responsible for the negligence of the driver of the vehicle in which he was being carried. His position was that of an innocent man who was injured by the combined negligence of two parties and who therefore could sue either or both. The Court held, however, that he must for the purpose of the case be held identified with his driver and decided in favour of the defendant. But *Thorogood v. Bryan* was in 1888 blown sky-high in *The Bernina* (13 A. C. 1), which laid down precisely the opposite rule.

In tracing the development of our case law, the sequence is usually this. A fairly simple case comes along, and a general principle is laid down. Upon facts that have something in common with the facts of the leading case, but comprise some new element, an action is brought. The new case is held to be within the leading case or is distinguished from it. The general principle may be either extended or restricted. Sometimes a case is overruled. The body of our Common Law is that which stands without dissent or being overruled. All the time the structure is growing. All the time the judges are, in a sense, making law, drawing of course upon previous decisions when there are any and exercising their common sense upon established lines when there are not. If they consult Roman law they will use it or reject it as seems to them proper. The principles thus established by our judges are as much the law of the land as if they had been enacted at Westminster.

That our lawyers, especially in the early days of our law making, had considerable recourse to the Roman law is beyond question, and stress is rightly laid upon the fact by many scholars (see, for example, W. S. Holdsworth's *Sources and Literature of English Law* and P. H. Winfield's *Chief Sources of English Legal History*). That the rate of our legal progress was somewhat accelerated by Roman legal thought must be admitted, but, all the same, I have no doubt that, had there been no Roman law to consult, our lawyers, by the aid of their common sense, would have ultimately arrived at the same conclusions as those reached by the Roman lawyers by the aid of their common sense. I cannot conceive, for example, that our law of bailment would

have been different had there been no Roman law of bailment. Moreover, there are many things in our jurisprudence upon which no assistance was derived from the Roman.

Roman law, no doubt, made the path easier for our lawyers, who had the advantage of studying the principles laid down in a civilization which had some striking resemblances to our own.

In the early days of English history, when population was scanty and when men's lives were primitive and their activities few, our case law was not extensive; the issues that came up for decision were comparatively simple, and judgments upon them were accordingly very short. But as time went on the issues became more frequent and more subtle, and the judgments in our books, which necessarily had to deal with and distinguish previous cases, tended to length. It is astonishing what a wealth of new law is added to our treasure-house every day. Take, for example, the question of negligence in relation to persons of tender years. Since the decision in *Lynch v. Nurdin* (1841), 1 Q. B. 29—the case of children playing on or about an unattended cart upon the highway—children and young persons have swarmed into our Courts. The most remarkable and the least understood of this class of cases is *Cooke v. Midland Railway Co. of Ireland* [1909] A. C. 229. Closely akin to this class of decision are such cases as *Lowery v. Walker* [1911] A. C. 10, deciding the question as to laying traps for licensees. In connexion with the subject of injury to trespassers, what I may call quasi-trespassers, licensees and invitees, there have been many valuable modern decisions; and, if I may say so without impropriety, there is no more luminous judgment in the books than the decision of Lord Sumner (then Hamilton L.J.) in *Latham v. Johnson* [1913] 1 K. B. 398. A striking instance of how a novel point may arise and graft a new principle—or, perhaps, it may be said, explain the old principle—is shown by the case of *Murphy v. Hurly* [1922] 1 A. C. 369. Long ago it was well settled that where a landlord has covenanted with a tenant to keep the premises in repair he is not liable for breach of the covenant unless the want of repair has been brought to his notice and he has thereafter refused or neglected to repair. It is plain common sense. If the tenant's chimney is out of order, the landlord cannot know of it, and ought not to be held responsible for its condition or for a fire that arises from its condition, unless the tenant, who does know or who ought to know, tells him. In other words, the requirement of notice is implied in the contract, having regard to its subject-matter. But in *Murphy v. Hurly* the thing which was

out of repair was a sea-wall which the landlord had covenanted to keep in repair, which he could see as well as his tenants, and which, in fact, was constantly overlooked on the landlord's behalf by a bailiff, to whose negligence the breakdown of the wall at flood-tide was due. The landlord was held liable, for the necessity for notice was not to be implied, having regard to the character of the subject-matter of the covenant. In each of the cases I have given, you will agree with the decision—the common sense of it must appeal to you.

The definition that Lord Moulton gave of our law lacked, I suggest, something, for it omits the agency whereby the common sense of the community is to be crystallized. My own attempted definition, while supplying that omission, lacked something more fundamental. It spoke of common sense, whereas it should have said 'common sense of the community.'

The common sense of one community differs from the common sense of another. So, also, does the common sense of a given community at one period differ from its common sense at another. Men's values of things arise mainly from social necessities, which vary enormously as the centuries roll by. In primitive times, when violence was rampant and the highwayman and those in league with him were powerful agencies for mischief, the essential thing was to preserve the peace and to secure every man in possession of his property. From which it followed that our criminal code was almost savage, and that the law pressed heavily upon the innkeeper and the carrier, persons supposed to be prone to sinister associations with 'the deliverers of the Commonwealth,' as the facetious gentry of Sherwood Forest called themselves. It was said at one time that a man could knowingly keep a ferocious dog, and let him loose at night, so as to keep people off his premises during the hours of darkness (*Brock v. Copeland* (1794) 1 Esp. 203). To the prodigious respect accorded to the possession of a strong right arm, as well, perhaps, as to the influence of the Church, was due the dependence of women. How far removed are we from the age when it could be said that 'by the law of God, of nature, of reason, and by the common law, the will of the wife is subject to the will of the husband' ! (Hale C.B. in *Manby v. Scott* (1659) 1 Sid. 109.) Christianity was part of the law of England, and the law of blasphemy was extremely rigorous. Restrictions upon trade were anathema to the judges; so was any combination of workmen to raise wages. It was a civil wrong and a criminal offence to give evidence without being subpoenaed, this being maintenance, as was the purchase of a chose in action. To advocate

birth control would probably have been deemed a criminal offence fifty years ago.

The times have changed and the law with them. The old law as to maintenance became obsolete so far as the examples I have given were concerned. Judges evolved principles for the regulation of restraints upon trade that were more in accord with the requirements of modern commerce. But it is chiefly by legislation that the law is brought up to date, though here and there some antiquated principles remain still rooted in our jurisprudence. One of them, of which I have a special abhorrence, is that a husband can be sued for his wife's tort.

If any member of this audience has a taste for playwriting, I suggest to him a theme which will put an end to this absurdity. A great lawyer politician marries a woman much younger than himself. She is greatly bored with him, wants a divorce and is or pretends to be wicked. For conscientious, social or political reasons, the husband is opposed to divorce. The devil in her prompts her to compel him to divorce her. Having heard from him in the honeymoon days of a husband's liability for his wife's tort, she slaps the housemaid—damages which her husband has to pay, £100; she runs her motor-car into a policeman—damages, £500; she writes a most foul libel on the Prime Minister's wife—damages, £5,000. Some fun could be made out of these incidents and out of the poor man's weakening in his scruples and his final surrender in the hope of avoiding an avalanche of financial disaster. Such a play would have the effect of removing this obsolete principle from our law, for legislation would be forced upon Parliament.

Between our case law—the principles of which, in the nature of things, are more or less stationary—and modern requirements—which are constantly changing—there must always be a gap. This gap it is the function of the Legislature to lessen or close up from time to time. But the English people are sometimes slow in the business. This is perhaps due to their patience, a quality which they possess in a supreme degree. But patience may pass the limits of a virtue, and I incline to the view that in England it is a vice.

While from time to time our case law needs to be brought into conformity with modern requirements, there is one recent instance in which the judges seem to have more accurately represented the will of the community than the Parliament which set about correcting them. Plaster it over as you may, picketing of any kind is intimidation; it is an infringement of the right to think that a workman who chooses to think for

himself should have his life made a nuisance by being dogged by one or more scowling comrades. When it was sought to justify picketing in the Courts, that great judge, Lindley L.J., said of it in *Lyons v. Wilkins* [1896] 1 Ch. 823: 'Until Parliament confers on trade unions the power of saying to other people, "You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon," trade unions exceed their power when they try to compel people not to work except on the terms fixed by the unions. I need hardly say that up to the present moment no such power as that exists. By the law of this country no one has ever; and no set of people have ever had, that right or that power. If Parliament chooses to confer it on trade unions, it will do so as and when it thinks proper, and subject to such limitations as it thinks proper; but it is idle to pretend not to see that this struggle exists. Trade unions have now been recognized up to a certain point as organs for good. They are the only means by which workmen can protect themselves from tyranny on the part of those who employ them; but the moment that trade unions become tyrants in their turn, they are engines for evil; they have no right to prevent any man from working upon such terms as he chooses.' The struggle which Lord Lindley referred to was ended by the capitulation of the Liberal party in 1906, when the Trade Disputes Act was passed. The struggle has recently been renewed, and by the statute of last year the liberty of the workman has been substantially restored.

Our case law grows from day to day. Ramifications of, and restrictions upon, old principles appear constantly. The question arises how far codification should supersede a mass of decisions.

The advantage of codification *per se* is that it makes the law more accessible and perhaps, in some respects, more intelligible. If codification is accompanied by amendment, then, of course, other advantages may appear. Successful examples of codification are the Bills of Exchange Act and the Sale of Goods Act. Yet it will be noted how many decisions there are upon these codes; and, speaking offhand, I can hardly express unmixed satisfaction at the result of section 14 of the Sale of Goods Act, which left the question of the defendant's liability in *Wallis v. Russell* [1902] 2 Ir. R. 585 to turn more or less upon the question whether the defendant purchased crabs for tea or for some other purpose—that of keeping them in a glass case being the only alternative that occurs to my mind. The real difficulty about codification is to make the law more clear and more

precise than it has in most instances been made by our judges. What I may call 'flexible' terms must be called in aid of any code, such as the term 'reasonable'; and, of course, what is or is not reasonable conjures up a great vista of possible litigation. The question of codification is obviously one of convenience and, therefore, not of supreme importance, though the growing bulk of our case law will no doubt compel it in many branches.

As our law is being made—in the sense I have explained—every day by judges, it is important that they should be without improper bias. Quite recently it was suggested that our judges are subject to bias. But there is a right bias as well as a wrong bias. There is a bias for right, for justice, for law and order. Every judge has this bias. It may be admitted that even such a bias may carry away a judge and lead to injustice, but, in a country where our criminal code and procedure deal so fairly—not to say favourably—with accused persons, where public opinion is so strong against oppression, and where professional tradition reaches such a high standard, the possibility of a miscarriage of justice owing to a judge's conservatism may safely be discounted.

Before I conclude my paper, may I presume to give a word or two of advice to the student of our Common Law. I want him not merely to know a case and the result of it, but to think out for himself the reasons for it. A few dozen cases reasoned out in that way are of inestimable value. If the student's reason for the decision is not quite the reason assigned in the books for it, I should welcome that as a wholesome sign of courageous and virile thought. There are bad decisions in the books and bad reasons for good decisions. To learn to think is essential. To glance at a subject is not enough; toss it about, and look at it from all sides, and repeat the operation several times before coming to a conclusion upon it. The use of examples to illustrate a proposition is a great help.

If a student has any desire to express himself in writing about any branch of law, however insignificant, I should advise him by all means to foster the desire and give it play. This is certain—to write about any section of law helps enormously in the grasp of any other section when the mind is turned to it. Write a book on criminal law, and you are thereby better equipped for the law of specific performance. There is always plenty of scope for text writers on many subjects. In the beginning of a man's career at the bar, in the years before he gets busy—and I hope these years will be few in your case—

there is leisure to write a book, and a good book is often the foundation of a good practice. But whether it is or not, the writing of a book pays the writer by the sense of intellectual gratification it gives him. Edmund Burke has told us 'the law is one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together.' It is, therefore, worth putting all our powers into it.

Watch the common sense of your case law. Let me give an example. A trespasser can be repelled. Whether the means taken to repel him are lawful or not depend upon the nature of the trespass. If an armed burglar at night advances towards you in your own house don't hesitate for a moment; get you shot in first. If a policeman arrests you wrongfully, don't attempt to shoot him, for you will be guilty of manslaughter at least. Offer him a polite resistance; go with him quietly to the police station, and have it out of him afterwards before his superiors or in the law Courts. If you catch a boy stealing your apples, put him out of your orchard; but don't set spring guns for him or you will come within *Bird v. Holbrook* (1828) 4 Bing. 628. Is not all that the plainest common sense? And as you meander through the legal mazes watch how right and wrong often shade into each other almost imperceptibly. For the difference is so often one of degree. It is an important principle, and it is so frequently forgotten. If you meet in the books a proposition that is said to be of universal application, and you have a doubt about it, test it by taking an extreme case within it. If a gross injustice is worked by the application of the principle, be doubtful about that principle. It may be a good principle, generally speaking, but question its being a universal principle. There are not so many universal principles as is sometimes supposed.

To stimulate you to thought, I offer you, with Mr. Goodhart's concurrence, two subjects for essays. They do not require very much research. One is: Assume the defendant in *Lowery v. Walker* [1911] A. C. 10 to have been a trespasser, what should be the result? The other is the following: A person of perfectly sound mind chooses to disappear. He selects a place to which there is much resort. He there leaves his motor-car in such a position as to suggest an accident—for example, in close proximity to a cliff or something of that sort. The people and police are much exercised in a search for his body, and great expense is incurred. The disappearance is a practical joke. Will the joker (a) be civilly responsible for damage and

(b) criminally responsible, and, if so, for what? Say why. I offer a book prize (value £2 2s. 0d. or thereabouts) for short essays upon these subjects. The 'Right to Disappear' intrigues me greatly,¹ though I have myself no doubt as to the true conclusion upon it.

EQUITABLE LIENS UNDER HIRE-PURCHASE
AGREEMENTS.

H. A. HOLLOND.

THE provisions of the Law of Property and Land Charges Acts, 1925, in regard to the registration of land charges, have modified, almost to the extent of annihilation, the dependence of equitable interests on the question whether the legal estate owner had actual notice, or was affected by constructive notice, of their existence. The exact scope of those land charges which are included by the Land Charges Act, 1925, s. 10, sub-s. 1, Class C (iii), under the term 'general equitable charges' remains to be delimited. The editors of the eleventh edition of Wolstenholme and Cherry's Conveyancing Statutes comment with characteristic caution: 'This paragraph sweeps up the remaining equitable charges, not otherwise specifically named, which require protection.' This does not help us very much. It is presumed that the lien which an unpaid vendor of land has for the purchase-money is a general equitable charge, and requires to be registered. But what about the charge which a *cestui que trust* has on land which has been bought out of a mixed fund consisting partly of trust money and partly of the trustee's money, for the amount of the trust money laid out in the purchase? The new rule does not seem exactly appropriate to such a case.

There is one class of equitable lien which it is difficult to regard as a general equitable charge, although it seems to come within the description given in the paragraph cited above, namely, 'any other equitable charge which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect any interest arising under a trust for sale or a settlement.' The class of lien referred to is the lien of a vendor, under a hire-purchase agreement, of machinery which is intended to be, and is, fixed to the land.

It is possible that in determining questions of priority where such liens are concerned, it will still be necessary to apply the pure principles of equity uncontaminated by statutory provisions as to registration.

The necessity for such a lien arises from the doctrine that chattels fixed, in the sort of way in which heavy machinery is generally fixed, to the fabric of a factory become part of the land. The applicability of this doctrine to such cases was settled by the House of Lords beyond cavil in *Reynolds v. Ashby*.¹ Holdway, the owner of a factory built on leasehold land, mortgaged the premises, first to Burrows, secondly to Hatt, and thirdly to the respondents. Subsequently Holdway made with the appellant a hire-purchase agreement, whereby the appellant agreed to let heavy carpentering machinery to be used in the factory, and Holdway agreed to hire it and to pay for it by instalments at specified times. The machinery was to become the property of Holdway as soon as the payments were all duly made, but if default was made in punctual payment of any of the instalments the appellant might determine the hiring and enter and resume possession of the machinery. It was to continue to be the sole and absolute property of the appellant until the last payment should be made.

In pursuance of the agreement the machines were delivered and fixed to concrete beds by bolts and nuts. Later, Holdway being in default, Hatt took possession of the premises under his mortgage, and the appellant gave notice determining the hiring and demanding the return of the machinery.

Then the respondents bought up the interests of the other mortgagees, took possession, and refused to deliver up the machines to the appellant. The respondents were held justified in their refusal by Lawrance J., by the Court of Appeal, and by the House of Lords. The principal judgment in the House of Lords was delivered by Lord Lindley, who applied the rule, well known in regard to fixtures, that attention must be paid to the nature of the thing, the mode of attachment, the circumstances under which it was attached, the purpose to be served, and last, but not least, to the position of the rival claimants in relation to the things in dispute. The purpose for which the machines were obtained and fixed was unmistakable; it was to complete and use the buildings as a factory. It was true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negatived any idea of treating the machines, when fixed, as movable chattels. There was a long series of decisions of the highest authority showing conclusively that, as between a mortgagor and a mortgagee, machines fixed as these were to the mortgaged land passed to the mortgagee as part

¹ [1904] A. C. 466.

of the land, the case most frequently cited with approval being *Hobson v. Gorringe*.²

The fact that this application of the principle *Quicquid fixatur solo, solo cedit* inflicted great hardship upon the vendor of the machinery led to the attempt to find a way out in cases not covered by authority, and so to the notable decision of Parker J. in *Re Samuel Allen and Sons, Ltd.*³

A company called Samuel Allen and Sons, Limited, was incorporated on June 14, 1904, and acquired a leasehold warehouse and other business premises in Copperfield Road, Mile End, London.

By a hire-purchase agreement dated July 14, 1904, and made between William Lee and John R. Lee, carrying on business as Lee and Hunt, and thereafter called 'the owners,' of the one part, and the company, thereafter called 'the hirers' (described as of 24 and 26, Copperfield Road, Mile End), of the other part, it was agreed as follows:—

(1) The owners agreed to let to the hirers certain machinery (specified in the schedule) which was then already fixed to the company's business premises, on the conditions thereafter contained. (2) The hirers were to pay £110 14s. on the signing of the agreement in consideration of the option of purchase thereby granted, and were to pay the owners, without previous demand, a monthly rent of £66 8s. 6d. for the hire of the machinery so long as the hirers thought fit to continue the hire. (3) The hirers were to keep the machinery in their own custody and possession at 24 and 26, Copperfield Road, and not to suffer the same to be removed without the consent of the owners, and not to interfere with the owners' name-plates or marks upon the machinery. (6) The hirers were to keep the machinery free and exempt from legal process. (8) 'The hirers may at any time during the hire become the purchasers of the said machinery by paying the sum of £1,107 0s. 3d., and in that event credit will be given for all previous payments, including the said sum of £110 14s.' (9) 'When the hirers shall by such payments as aforesaid have paid to the owners the full sum of £1,107 0s. 3d., then the said machines shall become the absolute property of the hirers, but until such payment in full the hirers shall merely remain bailees.' (10) In case of default in the monthly payments, or breach of the conditions, or the liquidation of the company, the owners were to be entitled to enter and remove the machinery. (11) If the owners took possession under clause 10,

² [1897] 1 Ch. 182.

³ [1907] 1 Ch. 575.

and the hirers did not exercise an option given to them of purchasing the machinery within a limited time and at a certain amount, the hirers were not to be entitled to any credit allowances or return for, or on account of, any payments previously made by them.

By an instrument executed under the common seal of the company on July 24, 1905, and addressed to the London and Provincial Bank, Limited, the company declared that it had deposited with the bank a land certificate and the lease of the premises in Copperfield Road, to secure a current account with the bank, and agreed to pay the amount of the account, and charged its business premises, with the appurtenances thereto, with the amount, and agreed to execute a legal mortgage on demand. The lease was at the same time deposited in accordance with the document. The bank had no knowledge of the hiring agreement. The company made default in payment of some of the instalments under the hire-purchase agreement, and on May 15, 1906, the landlords distrained on the machinery and other articles. The sheriff also seized the machinery and articles under a writ of *fiery facias*. A sale by auction was advertised, but did not take place.

On October 31, 1906, Lee and Hunt demanded delivery up of the machinery. On November 13, 1906, an order was made for the winding-up of the company by the Court.

The company was then still in arrear with its monthly payments, besides having committed breaches of clause 6 of the hiring agreement, and the sum of £515 11s. 8d. was due to the bank under its security. By arrangement the Official Receiver sold the machinery, and the proceeds of sale were held by him to abide the issue as to who was entitled thereto. In the meantime a summons was taken out in the winding-up by Lee and Hunt against the Official Receiver, the landlords of the premises in Copperfield Road, and the bank, for an order that the Official Receiver should forthwith deliver to the applicants the machinery which was let to the company on hire by the hire-purchase agreement of July 14, 1904.

On behalf of the vendors of the machinery it was argued that they had an equitable interest in the land by virtue of their agreement with the company, and that this interest being earlier in time than that of the bank, whose mortgage was an equitable one, had priority over the latter interest. On the other hand, it was contended that the hiring agreement created a purely personal right, and not a right which could in any way be enforced in equity against the land, and, therefore, that the purchaser

even of an equitable estate was not bound by that contract, and that the doctrines of priorities as administered in equity had no application at all.

Parker J. held that the hire-purchase agreement did create an equitable interest in the land and had priority.

In *Re Morrison, Jones & Taylor, Ltd.*⁴ a similar question arose between the vendors under a hire-purchase agreement of a fire-sprinkler apparatus and subsequent equitable mortgagees. Eve J. followed Parker J.'s decision. The case was taken to the Court of Appeal, counsel for the appellants arguing that the crux of the case was whether or not the right of the vendors of the fixtures was an interest in the land. He contended that it was not, and that the decision in *Re Samuel Allen and Sons, Ltd.* should be overruled. The Court (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.) were unanimously of opinion that Parker J.'s decision, though it involved a novel application of the conception of an equitable interest, was sound. 'In my opinion,' said Swinfen Eady L.J., 'this contract does effectually create an equitable interest in land, and the result is that the parties entitled must rank according to the dates of their respective securities. Here the contractors come first in point of time, and they are not displaced by the subsequent equitable charge.'

If we regard as established the principle that such hire-purchase agreements create equitable interests in land, we are faced with two consequential questions. What is the result when the creation of such an equitable interest is followed by the creation of a legal mortgage? And, secondly, what is the result when such an equitable interest is created in land which is already subject to a mortgage, legal or equitable?

With regard to the first point, the recognition of the right of the vendor of the machinery as an equitable interest in the land involves the corollary that a purchaser of the legal estate with notice of that interest is bound by it. A. L. Smith L.J., upholding the priority of the subsequent legal mortgagee in *Hobson v. Gorringe*, refers to the fact that he had no notice of the interest of the vendor of the machinery.⁵ And in *Re Morrison, etc.* Swinfen Eady L.J. said⁶ that it might well be that if the company had created a legal mortgage without notice the considerations would have been different.

Might the question of constructive notice have arisen? It is arguable that as it is well known that a great deal of machinery

⁴ [1914] 1 Ch. 50.

⁵ [1897] 1 Ch. at p. 192.

⁶ [1914] 1 Ch. at p. 60.

is bought under hire-purchase agreements, a reasonable man advancing money on the security of a factory would inquire whether all the machinery is the absolute property of the mortgagor or not. And it seems to be not unusual in such hire-purchase agreements for the purchaser to contract that he will not interfere with the vendor's name-plates or marks upon the machinery. It is arguable that the presence of such name-plates or marks would constitute constructive notice to a mortgagee. This contention was advanced by counsel in *Hobson v. Gorringe*,⁷ but A. L. Smith L.J. rejected it with the statement that the hire-plate was no more than an indication of what the agreement was, and that as there was no evidence whatever that Mr. Gorringe was ever aware of it, it could not affect his right as mortgagee in fee of the land.

The second question, concerned with the position of an equitable interest in fixtures attached to the land after the creation of a legal mortgage, is covered by authority. *Reynolds v. Ashby* established the right of the mortgagee to treat such fixtures as part of his security. This may not be just, for the mortgagee gets as part of his security something which was not included in his calculations when he advanced his loan. But it is the law. There was a way out, but the House of Lords did not take it. In *Gough v. Wood*,⁸ Edmonds, a nurseryman, made a legal mortgage of his leasehold land to the plaintiff. Subsequently the defendants supplied a boiler under a hire-purchase agreement. (The agreement was made before the date of the mortgage, but the mortgagee had not notice of it.) Before all the instalments had been paid Edmonds was adjudicated bankrupt. The defendants entered on the land and unfixed and removed the boiler. The plaintiff brought an action against the defendants for damages for the removal of the boiler, which he claimed to be included in his mortgage. Wright J. gave judgment for the defendants. His decision was affirmed by the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.). The Court followed the decision of North J. in *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*⁹ The *ratio decidendi* is well explained by Lindley L.J. 'By leaving the mortgagor in possession the mortgagee impliedly authorized him to carry on his business and to sell and remove the plants, trees and shrubs, which, though fixed to the soil, constituted his stock-in-trade. This implied authority can hardly be confined to such

⁷ [1897] 1 Ch. at p. 195.

⁸ [1894] 1 Q. B. 713.

⁹ [1892] 1 Ch. 415.

things, but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing *bona fide* with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded.' Lindley L.J. was careful to add that the question whether the defendants could have removed the apparatus, supposing that the plaintiff had already taken possession under his mortgage, was one which it was unnecessary to decide, and on which he expressed no opinion. And the same question was left open by Kay L.J., who said that as the boiler was removed while the mortgagor was in possession and was carrying on, with the assent of the mortgagee, a business for the purposes of which it was fixed, his licence might be held to extend so far as to permit the removal while the business was being carried on by the mortgagor, and before the mortgagee put an end to it by taking possession.

The principle of the implied licence was pressed upon the Court of Appeal in *Reynolds v. Ashby*.¹ It is, indeed, difficult to see how it can be fair that, if a vendor of apparatus supplies it on the faith of a licence arising by implication from the conduct of the mortgagee, such licence should be deemed revoked by the mortgagee's entry into possession. Justice seems to demand that the licence should be deemed to be extended to the removal of the fixture within a reasonable time after the mortgagee takes possession. Neither in *Hobson v. Gorringe* nor in *Reynolds v. Ashby* did the Court of Appeal give any reason for making the mortgagee's entry into possession the determining factor. The judges merely say that it is. For instance, Romer L.J. said²: 'It may be that, until the mortgagee takes possession of the premises, there is an implied licence by him to the mortgagor in the ordinary course of business to remove or change machinery affixed to the premises, and that that licence would, as between the plaintiff and the mortgagee, have entitled the plaintiff to assert his right to the machines before the mortgagee entered into possession; but any such implied licence would cease, I think, when possession was taken by the mortgagee. I cannot see my way to infer any licence which would then entitle the plaintiff to remove these machines.'

¹ [1903] 1 K. B. at pp. 91, 92.

² [1903] 1 K. B. at p. 102.

And later he says³ that it is important that the law with regard to fixtures as between mortgagor and mortgagee should not be unsettled, and that 'it might be very injurious to mortgagors engaged in trade, and even to persons dealing with them, if a mortgagor could not borrow money on a long leasehold security, including what are *prima facie* trade fixtures, without that security being unimpeachable as regards the fixtures on the ground of its being a bill of sale.' This argument is valid enough with regard to fixtures which were *in situ* at the time when the mortgage was made, but it does not touch the question whether it is fair that the mortgagee should have added to his security things which were not part of his security when he made the loan, in spite of the fact that the unpaid vendor has an equitable interest in them.

In *Reynolds v. Ashby* counsel for the appellant did not, unfortunately, submit to the House of Lords the argument of an implied licence. They based their case on the argument that the machinery had not become part of the land, but remained a chattel throughout. Here they had an overwhelming mass of authority against them, and the House obviously found no difficulty in rejecting their view. The possibility of an implied licence was not mentioned except by Lord Halsbury L.C., who, as will be seen from his judgment, was obviously uncomfortable about the decision. 'I cannot say that I am satisfied with the mode in which this case has been disposed of. There are various modes by which things, when they are trade fixtures, can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here, and which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an express or implied contract between the parties interested in such a transaction, machinery for the purpose of working in a factory might be protected so that an unpaid vendor who has lent on the hire system machinery to a person who wanted to use it in his mill, might make it safe from being absorbed either by creditor or by landlord. There is nothing, however, here from which I can infer either an express or implied contract for the removal of these articles, which undoubtedly were fixed, and under these circumstances I do not dissent from the conclusion at which your Lordships have arrived.'

The law, therefore, stands that the mere fact of the mortgagee's allowing the mortgagor to remain in possession

³ At p. 103.

constitutes an implied licence to unpaid vendors of machinery, and like things, which are annexed to the land as fixtures after the date of the mortgage, to remove them before the mortgagee takes possession. The licence is deemed revoked by the mortgagee's entry into possession, unless there are circumstances from which a more extensive privilege can be implied.

There seems to be no reason on principle for distinguishing the rights of an equitable mortgagee from those of a legal mortgagee in this connexion. The equitable mortgagee's interest is prior in time to that of the vendor of the fixtures, and so must prevail.

An interesting suggestion has been made judicially, which should be noted in conclusion. In *Gough v. Wood* Lindley L.J. said⁴: 'This agreement was not under seal, and did not, therefore, amount to a grant of land or of an easement, to which any subsequent mortgage would be subject.' And in *Hobson v. Gorringe*⁵ A. L. Smith L.J. said: 'This right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King [the mortgagor] of the land.' It is submitted that the suggested legal interest in land, to be created by the vendor of a fixture under an agreement by deed, is not sufficiently analogous to any established form of easement to justify its recognition by the Court. But in view of the eminence of the judges by whom the suggestion has been put forward, *obiter* of course, the possibility of the creation of such a legal interest in land cannot be ignored.

⁴ [1894] 1 Q. B. at p. 717.

⁵ [1897] 1 Ch. at p. 192.

Dr. JOHNSON AND THE OLD BAILEY.¹

THEOBALD MATHEW.

WE all know the Old Bailey—now, by statute, the Central Criminal Court—in Newgate Street. The Old Bailey as Dr. Johnson knew it is no more, and the present building is still in its infancy—blooded, it is true, but an infant. Its predecessor—a gloomy and forbidding structure—had had a long, busy and unwholesome career before its disappearance some twenty years ago.

Just after the 'Vanity of Human Wishes' had appeared—that is to say, in 1750—'every part of the Court and Gaol of Newgate was cleansed and washed with vinegar,' and orders were issued that prisoners should be treated with the same fluid before being brought to trial. No more than fifteen of these purified persons were to be in Court at the same moment. And before the sitting of the Court, hot irons were to be plunged into buckets filled with herbs. Bunches of rue were also to be provided for the judges, the Recorder, and the other officials. These drastic measures, which did not include the overhauling of the drainage system (if any), were taken in consequence of a visitation of gaol fever which carried off at one fell swoop a lord mayor, an alderman, several learned counsel and two judges—Mr. Justice Abney and Mr. Baron Clarke. Chief Justice Lee also had a narrow escape from death, as had the Recorder of London. An eminent physician reported that 'the closeness and stench of the place' were the proximate causes of the disaster, and to this day bouquets of flowers—the modern substitute for the bunches of rue—decorate the dock and the judgment-seat at the Old Bailey. But in these insanitary surroundings there was plenty of work done. Hangings, transportations, floggings, sentences to the pillory and to the hulks, were everyday affairs. The criminal law was a shocking thing in the eighteenth century. No European country had such a savage code or punishments so brutal. There were some two hundred capital offences. Stealing from the person, from a dwelling-house, from a shop, cutting down a tree, stealing linen from a bleach-yard, stealing fish—

¹ Read to Cambridge Law Society, November 19, 1927.

all these spelt Tyburn, unless the offender happened upon a kindly judge or a merciful jury.

The prisoner could not be defended by counsel as he is now. True, an advocate might cross-examine on his behalf, but he was not allowed to address the jury. The culprit had to make his own speech. It was not until 1836 that this disability of defending counsel was removed, and when the Prisoners' Counsel Act of that year was introduced, the majority of the judges protested vigorously. Mr. Justice Park went so far as to threaten that he would resign if the measure became law. When Parliament accepted the Bill that learned judge, it is satisfactory to note, saw his way to continuing his services to his king and country, and was able to inform grand juries how entirely he disapproved of the Act for many years to come. At the end of each sessions at the Old Bailey there was a crop of candidates for the gallows, and everybody was callous and unconcerned.

Some time ago I came across a pleasing passage in an eighteenth century magazine which I have endeavoured in vain to recapture. It was headed 'Considerate Conduct of a Judge,' and it ran (as nearly as I can recollect) as follows: 'Last Wednesday Mr. Baron Somebody, whilst sitting at breakfast in his mansion in Russell Square, suddenly remembered that he had failed to forward to the authorities the jury's recommendation to mercy of one of the prisoners whom he had sentenced to death at the recent Old Bailey Sessions, and that the executions were to be carried out that day. The judge at once sent his footman to the Old Bailey to endeavour to stay the execution of the prisoner in question. The messenger, we are glad to say, arrived in time, and returned to convey to Mr. Baron Somebody the grateful thanks of the unhappy malefactor.' Such was the spirit of the Old Bailey. And there was no real appeal open to the prisoner from verdict or sentence. On the facts, none at all; on the law, only if the judge chose to reserve a point for the consideration of his brethren. If he thought his ruling was wrong, a bloody-minded judge might refuse to reserve the point. When a judge consented to do so, the tribunal of appeal consisted of the other judges of the Court of King's Bench, Common Pleas and Exchequer sitting—not in Court—but at Serjeants' Inn in Chancery Lane, where, after dining comfortably, they discussed the problem in hand at the port stage of the proceedings. Not till the middle of the nineteenth century was this farcical business ended by the establishment of the Court for Crown Cases Reserved; and it was only in 1907 that a real Court of Criminal Appeal was created.

Kindly Christian as he was, Dr. Johnson, I regret to say, seems to have had no criticisms to offer upon the barbarous criminal code and the horrible sentences of his day. His Toryism hardened his heart. The mild reform which did away with the solemn procession of the condemned criminal from Newgate to Tyburn he heartily condemned. To Sir William Scott (the Tory brother of that still stouter Tory, Lord Eldon) he spoke freely: 'The age is running mad with innovation, and all the business of the world is to be done in a new way; men are to be hanged in a new way; Tyburn itself is not free from the fury of innovation. It is not an improvement. They object that the old method drew together a number of spectators. Sir, executions are intended to draw spectators. If they do not draw spectators, they do not answer their purpose. The old method was most satisfactory to all parties; the publick was gratified by a procession; the criminal was supported by it.'

I am afraid that, had he taken part in the debates in the House of Commons in 1808 on Romilly's bill to repeal the Act of Elizabeth, which made stealing from the person a capital offence, he would have agreed with the Solicitor-General, Sir Thomas Plumer, that the thing could not be done. For, as the Solicitor-General pointed out, if the old statute were repealed the maximum sentence on one who stole from the person would be transportation for seven years, which was entirely inadequate. And he would have voted for Sir Thomas's clause, which made transportation for life the new punishment. I fear, too, that Dr. Johnson would have stood by the side of Lord Eldon, a few years later, when that wise Lord Chancellor induced the House of Lords to throw out the bill to remove 'stealing five shillings from a shop' from the list of capital offences, and would have applauded his two sound reasons for resisting this mischievous attempt to tamper with a wholesome law—(1) that the picking of pockets had sadly increased since it had ceased to be a hanging matter, and (2) that if the House of Lords said that a man who stole five shillings from a shop should not be hanged, the next thing, no doubt, would be a proposal that to steal ten shillings from a shop should not be a hanging matter.

What would Dr. Johnson have said to the mawkish doings of to-day? To the private hangings, the short sentences, the 'second division,' the binding over of first offenders? We can imagine a conversation between Boswell and Dr. Johnson on the subject. 'I asked him what he thought of the "Probation of Offenders Act."' He replied: "Adam, sir, was a first offender, and yet he was severely punished. Had his offence been overlooked he

would have gone from bad to worse. Those who framed this statute had not the Scriptures in mind.”” Words to this effect Boswell might have recorded.

Twice, as we know, Dr. Johnson came into close touch with this home of the criminal law. First, when Baretti had his little misfortune in the Haymarket, and Dr. Johnson was summoned to give evidence as to his character; and again when his pen played so active a part on behalf of the forger, Dr. Dodd.

It was on October 6, 1769—when (as Mr. Philip Guedalla might say) Warren Hastings was whispering sweet nothings into the ear of the Baroness von Imhoff on the Indian Ocean, and the duty on tea was agitating the patriots of Boston and Massachusetts—that the news reached Dr. Johnson and Sir Joshua Reynolds that Baretti had killed one Evan Morgan by stabbing him in a vital part. Dr. Johnson was greatly concerned. He had known Baretti for years; they had been abroad together; and that they were in complete sympathy is shown by the letters which they exchanged. ‘His account of Italy is a very entertaining book,’ he told Boswell, ‘and, sir, I know no man who carries his head higher in conversation than Baretti. There are strong powers in his mind. He has not indeed many hooks, but with what hooks he has he grapples very forcibly.’ And his letters to Baretti are intimate and newsy. ‘My Baretti’ is told that Miss Williams is pretty well; that Miss Charlotte is big of the fourth child; that Mr. Chambers has gone circuit with the judges, and so on; and the writer is his ‘affectionate humble servant.’ Sir Joshua Reynolds was the first to hear that Baretti was in trouble and the first to hurry to Bow Street. When he had been committed for trial Dr. Johnson and Mr. Edmund Burke went to see him in Newgate. Baretti must have been gratified by this attention, but he cannot have derived much consolation from his visitors, for they ‘bade him not to hope too strongly.’

The story of how it all happened is told in Baretti’s defence, as reported in the *Gentleman’s Magazine*. For the legend that Dr. Johnson composed this oration there seems to be no foundation. Baretti insisted that it was his unaided effort, and the internal evidence on the whole supports him. Possibly Dr. Johnson may have suggested the exordium: ‘On Friday, the 6th,’ Baretti said to the jury, ‘I spent the whole day at home, correcting my Italian and English dictionary, which is actually reprinting and working off; and upon another book in four volumes, which is to be published in February next, and has been advertised in the newspapers.’ He ought, one feels, to

have availed himself more fully of this opportunity. A modern author, similarly situated, would have mentioned the subject-matter, the price, and the publishers of the forthcoming volumes. They were probably *Travels through Spain*, which appeared shortly after his acquittal. Then Baretti accounted for his movements. He had gone at 4 o'clock to the club of the Royal Academicians in Soho, there had warmed himself in the club-room, had proceeded to the Orange Coffee-house to look for letters, and then had made his way back towards the club along the Haymarket. Eighteen yards from Panton Street he saw a woman—not two ‘as I hope God will save me.’ The woman had struck him, giving him great pain. ‘This I instantly resented by giving her a blow on the hand, with a few angry words.’ The lady had raised her voice and called him several bad names, in a most contumelious strain. He mentioned them, ‘“D——d Frenchman” and “woman-hater” were the most audible.’ Then ‘a man gave me a blow with his fist, and asked me how I dared strike a woman; another pushed him against me, and pushed me off the pavement; then three or more joined them.’ He wondered he did not fall from the high pathway into the coachway. Next, a crowd surrounded him, ‘many beating me, and all d——g me on every side in a most frightful manner. I was a Frenchman in their opinion, which made me apprehensive I must expect no favour nor protection, but all outrage and blows.’

There was a ‘great puddle’ at the corner of Panton Street, and he could plainly perceive they wanted to throw him into it, so he cried ‘Murder’ and ran. ‘I was in the greatest horror lest I should run against some stones, as I have such bad eyes. I could not run as fast as my pursuers, so they were upon me, continually beating and pushing me, and somewhere in Panton Street I gave a quick blow to one who beat off my hat with his fist.’ Then he took refuge in a shop in Oxenden Street ‘quite spent with fatigue.’

Three men came into the shop—one of them a constable—and on their assurance that they were honest men ‘I put up my knife, desired them to arrest me, and begged them to send for a coach and take me to Sir John Fielding.’ That excellent magistrate was found and Baretti, having told his tale, was detained. He was permitted to send for his friends, and before long ‘Sir Joshua Reynolds and other gentlemen came to me.’ Then he described his going to Tothill Fields in a coach, and how the coachman had lost his way in the ‘mire and darkness,’ and how he had made no effort to escape. ‘That woeful night I

passed without rest.’ The next morning he found he had great pains in various parts of the body, and Mr. Molini and Mr. Low had observed the injured and bruised portions of his anatomy.

‘This, my lord and gentlemen of the jury, is the best account I can give of my unfortunate accident; for what is done in two or three minutes in fear and terror is not to be minutely described.’

Now comes a passage which I think may have been contributed by a learned friend from the Temple.

‘I hope your lordship and every person present will think that a man of my age, character, and way of life would not spontaneously quit my pen to engage in an outrageous tumult. I hope it will easily be conceived that a man, almost blind, could not but be seized with terror on such a sudden attack as this. I hope it will be seen that my knife was neither a weapon of offence or defence; I wear it to carve fruit and sweetmeats, and not to kill my fellow-creatures. . . . Little did I think such an event would have occurred. Let this trial turn out as favourable as my innocence may deserve, still my regret will survive as long as life shall last.’

The peroration, too, has a professional flavour. He might, as a foreigner, have had a jury *de medietate lingue*—that is to say, a jury composed half of aliens and half of Britons. This privilege was a doubtful one, as there was no guarantee that the foreigners would be of the same nationality as the accused. But it was right that the jury should be reminded that he, a stranger, had elected to be tried by Englishmen.

‘I beg leave, my lord and gentlemen, to add one thing more. Equally confident of my own innocence, and English discernment to trace out truth, I did resolve to waive the privileges granted to foreigners by the laws of this kingdom; my motive was my life of honour, that it should not be thought I received undeserved favour from a jury part of my own country. I chose to be tried by a jury of this country; for if my honour is not saved, I cannot much wish for the preservation of my life. I will wait for the determination of this awful court with that confidence which innocence has a right to obtain.’ ‘So,’ concluded the poor prisoner, ‘God bless you all.’

Then he called his witnesses—some who spoke to his bruised condition; some who had been attacked by women and bullies in the Haymarket on other occasions; and then his witnesses to character.

They were certainly a well-picked and impressive body. ‘Never,’ says Boswell, ‘did such a constellation of genius

enlighten the awful session house.' The stars included Sir Joshua Reynolds, Mr. Topham Beauclerk, Mr. Edmund Burke, Mr. Garrick, Dr. Oliver Goldsmith, and Dr. Johnson. They all, say the reports, represented him as a man of benevolence and sobriety, modest and learned. Mrs. Piozzi tells us exactly what the doctor said. 'I believe I began to be acquainted with Mr. B. about the year 1753. He is a man of literature, a very studious man, a man of great diligence. He gets his living by study. I have no reason to think he was ever disordered with liquor in his life. A man that I never knew to be otherwise than peaceable.' Q.—'How is he as to eyesight' A. (which will be appreciated by all myopic persons).—'He does not see me now, nor do I see him. I do not believe he could be capable of assaulting anybody without great provocation.'

Mr. Justice Bathurst was the judge. He was not held in high esteem as a person of intellect; but he was the son of an earl, and managed to climb on to the woolsack two years later. On the death of Charles Yorke, he and two other judges were named Commissioners of the Great Seal; and after some months, in default of stronger candidates, he became Lord Chancellor and a peer. A spiteful commentator said that the three Commissioners being unequal to the discharge of the duties of their position they were superseded by the least competent of the three; and Lord Campbell labels Lord Apsley as the most inefficient Chancellor of the eighteenth century. His judgments are forgotten, but Apsley House—which he built during his Chancellorship—keeps his memory alive. He did his part of the business briefly and gave the prisoner a good run. The jury promptly acquitted him.

'As it was much to the honour of the country,' says the *Annual Register*, 'in which a stranger not only met with justice, but even with support and protection, it was not less to his, who destitute of national interest and connexion in it, could alone from the unblameable tenor of his life and actions, procure such undeniable testimonials to the goodness of his character.' The distinguished witnesses to character were, no doubt, relieved when all was happily over, and Dr. Johnson not less than the others; although, as we know from the account of his visit to Newgate, he was prepared for the worst, and had boasted to Boswell that 'if Baretti should be hanged not one of his friends will eat a slice of plum pudding the less.'

Eight years had gone by when he had to bestir himself for the Rev. Dr. William Dodd. There is no doubt that that divine was hardly used, and it was a belief that Dr. Dodd ought, in

fairness, to be reprieved—not personal friendship, for he had only seen him once—that induced Dr. Johnson to make such extraordinary efforts to save him.

The doctor figures in the Dictionary of National Biography, and the injunction ‘no flowers’ has been faithfully observed by the writer of his life. He was born in 1729 and hanged in 1777, and he did a good deal in the forty-eight intervening years. Cambridge was his university and he won distinction as a mathematician. Hewasfifteenth wrangler. Afterleavingthe university he married imprudently. Miss Mary Perkins is said to have been a lady of doubtful reputation, which means, I suppose, that there was no doubt whatever that her antecedents had been frolicsome. He wrote a comedy and a eulogy on the deceased Prince of Wales —‘Fred, who was alive and is dead’—and then he became a curate in Essex and a popular preacher and philanthropist. The Magdalen Hospital (of which he was chaplain at £100 a year), the Society for the Relief of Poor Debtors, and the Society for the Recovery of Persons Apparently Drowned (which comes into the story at a later stage) all acknowledged him as founder. Also he wrote plenty of books, sermons to young men, a treatise on capital punishment, sermons on parables and miracles, a translation of the hymns of Callimachus, a work on Milton, another on death, the ‘Beauties of Shakespeare’ and many more—some fifty in all. His activities were duly rewarded, and he soon found himself Chaplain to the King and to the Bishop of St. Davids, a Prebend at Brecon and a Doctor of Laws. The sons of the nobility came to him to be coached at his country house at Ealing, and all was going so smoothly and prosperously that (like the Rev. Charles Honeyman) he invested his savings, and a sum of £1,000 which Mrs. Dodd won on a lottery ticket, in a chapel in Pimlico. Now his troubles began. Dr. Dodd apparently had a liking for ladies and other comforts and, to use a formula of the Bankruptcy Court, his expenditure exceeded his income. Debts began to accumulate. Something had to be done, so Mrs. Dodd was encouraged to approach Lady Apsley, the wife of the Lord Chancellor (the Bathurst J. of the Baretti trial), with an offer of £3,000 for the living of St. George’s, Hanover Square. Such visits had been successful in the past. At the trial of Lord Macclesfield, Master Thurston gave an interesting account of his interview with Lady Macclesfield, the presentation to her ladyship of 5,000 guineas, and his subsequent appointment to the office he deserved. Tryphena Lady Apsley was, however, made of sterner stuff and Mrs. Dodd went empty away. It was a sad error in tactics, for the incident led

to his being struck off the list of Royal Chaplains and to enforced exile. An old pupil, Lord Chesterfield, now came to his rescue and gave him a living, but debts again multiplied and then he did the foolish thing that took him to the Old Bailey. He forged a bond for £4,200, signing it with the name of Lord Chesterfield, and asked his friend, Mr. Robertson, to raise money on it. Robertson himself attested the signature, which he believed to be genuine. Messrs. Fletcher & Peach duly cashed it, and the bond was handed to their solicitor. All would have gone well but for a blot which the solicitor noticed on the word 'seven' in the bond. He did not quite like the look of the blot, so he advised the lenders to ask Lord Chesterfield for a fresh bond. Then the trouble began. Lord Chesterfield denied his signature, Robertson was arrested and Dr. Dodd was interviewed. Manley intimated that if the money were returned the matter would go no further, and the money was accordingly repaid. But the proceedings were not dropped, and Dr. Dodd was haled before the Lord Mayor and committed for trial. Throughout the doctor insisted that he could and would have taken up the bond in a few months, and that Lord Chesterfield would never have been troubled in the matter. He appeared at the Old Bailey on February 22, 1777, with three learned counsel to assist him with legal arguments. One of them was Buller, who afterwards adorned the bench. Mr. Gwynn, the recorder, was the judge. There was no real dispute as to the facts and the case was soon over. The only difficulty in the way of the Crown was the fact that Robertson, a party to the forgery, had been one of the witnesses before the grand jury. Buller, no doubt, prepared the written speech which Dr. Dodd read out to the jury.

Here is the defence. It was not effective. Dr. Dodd was a good elocutionist, but the speech, delivered from a manuscript, is a chilly thing.

'There is no man in the world who has a deeper sense of the heinous nature of the crime for which I stand indicted than myself. But, my lords, I humbly apprehend, though no lawyer, that the moral turpitude and malignancy of the crime always, both in the eye of the law and of religion, consists in the intention. I am informed, my lords, that the Act of Parliament on this head runs perpetually in this style "with an intention to defraud." Such an intention . . . has not been attempted to be proved upon me, and the consequences that have happened . . . sufficiently prove that a perfect and ample restitution has been made. . . . If an unhappy man ever deviates from the

law of right, yet if in the single first moment of recollection he does all that he can to make full and perfect amends, what . . . can God and man desire further? . . . Though I have met with all candour in this Court, yet I have been pursued with excessive cruelty; I have been prosecuted after the most express engagements, after the most solemn assurances, after the most delusive, soothing arguments of Mr. Manley. . . . Oppressed as I am with infamy, loaded as I am with distress, sunk under this cruel prosecution, your lordships and the gentlemen of the jury cannot think life a matter of any value to me. No, my lords, I solemnly protest that death of all blessings would be the most pleasant to me after this pain.' This last observation was, one cannot help thinking, unfortunate.

'I have, yet, my lords,' he proceeded, 'ties which call upon me—ties which render me desirous even to continue this miserable existence. I have a wife who for twenty-seven years has lived an unparalleled example of conjugal attachment and fidelity, and whose behaviour during this trying scene would draw tears of approbation, I am sure, even from the most inhuman. I have creditors—honest men—who will lose much by my death. I hope, for the sake of justice towards them, some mercy will be shown to me. . . . If not the slightest intention of injury can appear to anyone—and I solemnly declare it was in my power to replace it in three months, of this I assured Mr. Robertson frequently . . . I then hope, I trust, I fully confide myself in the tenderness, humanity and protection of my country.'

The jury quickly found a verdict of guilty, but no sentence was passed as the point concerning Robertson's evidence was reserved. This matter was debated by eleven of their lordships 'at their chambers in Serjeants' Inn'—thus the *Gentleman's Magazine* refers to the festive deliberations of the judges,—who came to the conclusion that the evidence was legally competent, and 'a messenger was dispatched to acquaint the doctor therewith.'

This meant that his sentence would be pronounced at the forthcoming Sessions in May, and Dr. Dodd had till the 16th of the month to prepare his final observations. Now it was that Dr. Johnson was approached by the Countess of Harrington, who had heard, with others, that the Doctor was on the side of mercy.

Her letter caused him 'much agitation,' and he said he would do what he could. The first thing was to see that Dr. Dodd should say the right thing to the Court at the last moment; and it was Dr. Johnson's address that he read to the

learned recorder when he was set at the bar to answer that most disagreeable question, 'What have you to say why judgment of death should not be passed upon you?'

It is so well known that I must not quote it at length—not that there is much of it. It cannot have taken ten minutes to deliver. But there are well-balanced and sonorous passages which bear the mark of the mint from which they came.

'I now stand before you a dreadful example of human infirmity. I entered upon public life with the expectations common to young men, whose education has been liberal, and whose abilities have been flattered; and when I became a clergyman, considered myself as not impairing the dignity of the Order. . . . I taught the truths of Christianity with the zeal of conviction and the authority of innocence.'

He asked his lordship to think how these considerations, if aggravating his crime, must embitter his punishment; and then humbly told the story of his fall. It was vanity that was his undoing.

'I had too much confidence in myself, and, thinking my integrity (what others thought it) established in sincerity and fortified by religion, I did not consider the danger of vanity nor suspect the deceitfulness of my own heart. The day of conflict came, in which temptation surprised and overwhelmed me. . . . Many have been overpowered by temptation, who are now among the penitent in heaven.'

After repeating the argument that he had not intended to be fraudulent, he closed with a telling appeal to be allowed to live: 'I have fallen from reputation, which ought to have made me cautious; and from a fortune which ought to have given me content. I am sunk at once into poverty and scorn; my name and my crime fill the ballads in the streets; the sport of the thoughtless and the triumph of the wicked. . . . Many motives impel me to beg earnestly for life. I feel the natural horror of a violent death, and the universal dread of untimely dissolution. I am desirous to recompense the injury I have done to the clergy, to the world, and to religion, and to efface the scandal of my crime by the example of my repentance. . . . Let not a little life be denied me, in which I may, by meditation and contrition, prepare myself to stand at the Tribunal of Omnipotence, and support the presence of the Judge, Who shall distribute to all according to their works; Who will receive and pardon the repenting sinner; and from Whom the merciful shall obtain mercy.'

The recorder thereupon passed sentence of death in a few

well-chosen words (prepared with no less care than those of Dr. Dodd) and (again to quote the *Gentleman's Magazine*) 'the miserable divine then retired.'

Dr. Johnson set to work again. He prepared a letter to Lord Bathurst and another to Lord Mansfield C.J., a petition to be presented by William Dodd, the doctor's brother, to the King, and another addressed by Mrs. Dodd to the Queen. 'My life has not been wholly useless' (says the letter to Lord Bathurst). 'I have laboured in my calling diligently and sincerely, but Success inflamed my Vanity and my heart betrayed me. Violent passions have exposed me to violent temptations.'

'I admit the truth of the verdict that condemned me,' he says to Lord Mansfield. 'Yet I hope that when my Evil is censured my Good may likewise be remembered, and that it may be considered how much the Society which is injured by my fraud has been benefited by my charitable labours. Once more let me beg for life, and when you see me going from the gloom of prison to the penury of banishment do not consider public justice wholly unsatisfied by the suffering of your humble suppliant.'

Then he drafted a petition from the City of London (the English of which, to his grim amusement, the Lord Mayor and corporation amended in several passages); and a letter in his own name to the future Earl of Liverpool, which, oddly enough never reached its destination. When it was clear that nothing could be done (the principal reason being that two highly respectable brothers named Perreau had recently been hanged for forging a bond in similar circumstances, and Lord Mansfield thought the reprieve of Dodd would be illogical) he wrote, for Dr. Dodd to deliver to his brother convicts, a final sermon or address, the heads of which were Faith, Obedience, and Repentance. The letter from Dr. Dodd to Dr. Johnson — 'thou great and good heart' — and Dr. Johnson's reply on the day before the execution, in which he humbly begged Dr. Dodd 'to make in your devotions one petition for my eternal welfare' are too sacred, perhaps, for repetition here.

Dr. Dodd made an edifying end; but to the last he hoped that the end might be postponed. There seems little doubt that he had made elaborate arrangements for his resuscitation after the hanging was over. As the founder of the Society for the Recovery of Persons Apparently Drowned he was familiar with the learned paper of Dr. Hunter on the subject of their restoration to life. Why should not the treatment for the apparently drowned serve for the apparently hanged? The

hangman is said to have been tipped. Dr. Dodd undoubtedly engaged him in conversation when he stepped from his mourning-coach, and when the ceremony was over Dr. Dodd's remains were conveyed as quickly as possible to a neighbouring house and experimented upon according to the directions of Dr. Hunter. But things went wrong. 'He hung an hour, and it was full forty minutes before he was put in the hearse.' All might have been well if he had been promptly 'cut down.'

Once all was over Dr. Johnson was philosophic. When the possibility of the hanging of one's friend was under discussion, he had told Boswell some years before, 'If he were once fairly hanged I should not suffer.' And he was as good as his word.

He occasionally discussed Dr. Dodd with his friends. Once he was disingenuous. Doubt having been expressed as to whether Dodd had really written anything as good as the 'Address to the Convicts,' Dr. Johnson replied in the immortal words: 'Depend upon it, sir, when a man knows he is to be hanged in a fortnight it concentrates his mind wonderfully.' He doubted whether Dodd's prayer for the King at the end of the 'Thoughts in Prison' was genuine. 'A man who has been canting all his life may cant to the last. And yet a man who has been refused a pardon after so much petitioning would hardly be praying thus fervently for the King.' He thought Dodd was honest in saying he had found the world an agreeable place. 'I respect Dodd for thus speaking the truth; for, to be sure, he had for several years enjoyed a life of great voluptuousness'; and when an admiring lady asked for a motto to decorate Dodd's portrait in a bracelet, 'I said I could think of no better than *Currat Lex*. I was very willing to have him pardoned. But when he was once hanged I did not wish he should be made a saint.'

THREE CASES ON POSSESSION.

A. L. GOODHART.

IN the recent case, *Great Western Ry. Co. v. Owners of S.S. Mostyn*,¹ Viscount Dunedin said: 'Now, when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear—as is the case in most instances—what the ratio decidendi was which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.' In other words, not only the judgment itself, but also the grounds on which the judgment was reached, are binding. This proposition must, of course, be understood to include the further rule that only those reasons are binding which were material to the decision of the point at issue. If they were material they constitute a precedent; if they were not material they are merely obiter dicta.

In Professor Wambaugh's valuable book, 'The Study of Cases,' we find a further rule which may be said to be the converse of the one stated by Viscount Dunedin.² 'A case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court. It is the duty of the court to deliberate. . . . If it can be shown that there was no deliberation, it follows that the case is of no authority for any proposition whatever. Further, if it can be shown that, although there was deliberation, a particular point was wholly absent from the consideration of the court, then, even though that point is conceivably an important one, the connexion of the decision with that point is not a connexion of effect and cause, but is purely accidental, and as to that point the decision is no authority whatever.' This rule and the one stated by Viscount Dunedin may be thought of as respectively the positive and the negative side of the same proposition. A case is a precedent for the doctrine on which the judges based their judgment; it is not a precedent for a doctrine which was not in the minds of the judges.

¹ [1928] A. C. 57, at p. 73.² Page 24.

That these two rules are not always strictly observed either by learned judges or by eminent text-book writers, who, in their anxiety to prove their point, either read into a judgment what is not there or refuse to see what it necessarily contains, is particularly well illustrated by the arguments which have centred round the famous cases of *Bridges v. Hawkesworth*,³ *Elwes v. Brigg Gas Co.*,⁴ and *South Staffordshire Water Co. v. Sharman*.⁵ In discussing the grounds on which these cases were decided, reasons for the judgments are occasionally attributed to the judges which a careful reading of the decisions shows were never in the mind of the Court, and at other times the actual ratio decidendi is deliberately ignored and grounds for the judgment, discoverable only in the imagination of the learned author, are substituted for it.

Of these cases *Bridges v. Hawkesworth*⁶ has had the most distinguished posthumous career. Born in the humble surroundings of a county court and during its life only achieving the modest distinction of an appeal to the Court of Queen's Bench, it can hardly have realized that more than seventy-five years later law students would be discussing its every word and fact. Its biography has been written at some length by Lord Russell of Killowen, Mr. Justice Holmes, Sir Frederick Pollock, and Sir John Salmond, and its fame rests in large part not on its own intrinsic value, but on their theories concerning the point which it involved.

The facts in this case, as stated by Patteson J., read⁷: 'The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by some one.' It may be noted here that the plaintiff had called on business as town traveller for another firm and, therefore, was not an ordinary customer. The county court judge decided 'that the defendant was entitled to the custody of the notes as against the plaintiff,' but this judgment was reversed on appeal.

On what ground did the Court of Queen's Bench reach its judgment? Neither counsel for the plaintiff nor for the defendant based any of their arguments on the fact that the notes were found in a shop. For that matter counsel for the appellant

³ (1851), 15 Jur. 1079; 21 L. J. Q. B. 75.

⁴ (1886), 33 Ch. D. 562.

⁶ *Supra*.

⁵ [1896] 2 Q. B. 44.

⁷ 15 Jur. at p. 1082.

assumed throughout that the shop was the same as a private house. His case was that the shopkeeper did not know of the parcel. He cited Savigny, 170⁸: 'Every case of possession is founded on the state of consciousness of unlimited physical power.'

Counsel for the respondent also quoted Savigny, 169: 'Possession of a thing may be acquired simply by the fact of its having been delivered at one's own residence, even though we are absent from the house at the time.' On this, the judges remark:—Wightman J.: 'There they were directed to the house; here, if the finder had put the notes into his own pocket, the owner of the shop would not have known of them. If you can put any case where the goods came into the house without the knowledge of the owner of the house, it would be in point.' Patteson J.: 'If property is intentionally in my house, it is certainly in my possession.'

Turning to Patteson J.'s judgment, we do not find a single reference to, or even a suggestion of any idea that the place where the notes were found was material.⁹ For that matter he distinctly repudiates such an argument¹: 'The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. . . . We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, *and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference.*'²

How surprised Patteson J. would have been if he had been told immediately after delivering his judgment that what he had really said was that 'the place in which they were found makes all the legal difference.' Yet this is what Lord Russell of Killowen did attribute to him in his judgment in *South Staffordshire Water Company v. Sharman*³: 'The case of *Bridges v.*

⁸ This citation is given only in the 'Jurist' report, at p. 1082. Its importance is obvious. We have used the 'Jurist' throughout this article, as the report is more complete than in the Law Journal Reports.

⁹ The headnote to the report in the 'Jurist' reads: 'The Place in which a lost Article is found does not constitute any Exception to the general Rule of Law, that the Finder is entitled to it as against all Persons except the Owner.'

¹ Page 1082.

² Italics ours.

³ *Supra*, at p. 47.

*Hawkesworth*⁴ stands by itself, and on special grounds; and on those grounds it seems to me that the decision in that case was right. Some one had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by Patteson J., that the notes, being dropped in a public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."

Lord Russell speaks of 'a *public* shop,' 'the shop was open to the *public*,' 'the notes, being dropped in the *public* part of the shop.' But when we turn to Patteson J.'s judgment we find that there is not a single reference to the public. So far was the learned judge from basing his conclusions on the fact that the shop was open to the public—which is, of course, doubtful, for a shop is only open to intending customers, and not to the public as such—that he referred to the shop as 'his house.' The ratio decidendi suggested by Lord Russell may be perfectly sound in theory, but it is not, we submit with all deference, the one on which the case was decided.

(p) 7 The textbook writers do not treat *Bridges v. Hawkesworth*⁵ quite so cavalierly, and do not put into the judgment words which were never there. But by suggesting possible grounds on which the case *might* have been decided, they tend to mislead the reader into thinking that it *was* on these grounds that the judges reached their conclusion. We are apt, therefore, to think of the case as a precedent for principles which were never even considered by the Court.

In his famous book, 'The Common Law,' Mr. Justice Holmes deals with the case as follows⁶: 'There is a class of cases besides those of bailees and tenants, which will probably, although not necessarily, be decided one way or the other, as we adopt the test of an intent to exclude, or of the *animus domini*. *Bridges v. Hawkesworth*⁷ will serve as a starting-point. There, a pocket-book was dropped on the floor of a shop by a customer, and picked up by another customer before the shopkeeper knew

⁴ *Supra*.

⁶ Pages 221 *et seq.*

⁵ *Supra*.

⁷ *Supra*.

of it. Common-law judges and civilians would agree that the finder got possession first, and so could keep it as against the shopkeeper. For the shopkeeper, not knowing of the thing, could not have the intent to appropriate it, and, having invited the public to his shop, he could not have the intent to exclude them from it. But suppose the pocket-book had been dropped in a private room, how should the case be decided? There can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is, without any knowledge of the object's existence.'

With the greatest respect to Mr. Justice Holmes, this statement of the case may prove slightly misleading to the student, for the ratio decidendi given is that of the learned author and not that of the Court. In the judgment no mention is made of the two different kinds of intent. It is not even clear that the question of intent was considered by the Court, although it was discussed by counsel. In so far as any ratio decidendi can be extracted from the case it is that the parcel was not in the shopkeeper's *custody*, because he owed no duty to the true owner. If he had been an innkeeper it would have been in his *custody*, because he owed a duty to the guest. The question of the particular intent was never discussed at all.

The second point, that 'having invited the public to his shop, he could not have the intent to exclude them from it,' is either negatived in the judgment or not considered by the Court. As already pointed out, the decision distinctly says that the 'place' does not make any difference. Therefore, the same rule would apply whether the stranger found the thing in a public shop or in a private room. This view may be supported on grounds not given by the Court, which apparently assumed the point to be too clear to require argument. A shopkeeper only admits the public for the purpose of shopping. He intends to exclude them from whatever is not necessary to accomplish this end. He does not intend, it is true, to exclude them from the shop, but he does intend to exclude them from what is in the shop. On analysis the position of a person who enters my shop cannot be distinguished from that of any person who enters my private room on a licence or on my invitation. It is submitted that a shopkeeper intends to possess everything in his shop just as much as a private person intends to possess everything in his room; in both cases there is an intention to exclude strangers from the thing. My friend visits me in my shop and finds a pocket-book on the floor; the next day he visits me in my home and by a

strange coincidence finds another pocket-book on the floor. In neither case have I excluded him from the *locus in quo*, and in both cases I have intended to exclude him from anything which was there.

Moreover, it is difficult to say under what circumstances the public is invited and when it is excluded from a place. Is the public invited to a doctor's consulting room, a solicitor's office, a tailor's shop, a theatre, a restaurant, or a store? For some purposes a theatre is a public place in law, while for others it is private; which is it for the purpose of possession? Some restaurants will only serve a particular class of patron. Are they open to the public? Is a proprietary social club a public or a private place in view of the fact that the performance there of a musical piece is a 'performance in public'?⁸ These examples show how difficult it is to draw the line between a place to which the public are invited and one from which they are excluded. We submit, therefore, that the 'exclusion' principle is an unsatisfactory one.

(7) Sir Frederick Pollock, in Pollock and Wright on 'Possession in the Common Law,' agrees with Mr. Justice Holmes that *Bridges v. Hawkesworth*⁹ was correctly decided, but he bases his conclusion on different grounds. He emphasizes the lack of *de facto* control on the part of the shopkeeper¹:— '§ 2. Evidence of Possession: Goods. . . . On the other hand, there may be circumstances excluding the occupier from *de facto* control. In such a case as *Bridges v. Hawkesworth*,² where a parcel of bank-notes was dropped on the floor in the part of a shop frequented by customers, it is impossible to say that the shopkeeper has any possession in fact. He does not expect objects of that kind to be on the floor in his shop, and some customer is more likely than the shopkeeper or his servant to see and take them up if they do come there. . . . A case like this illustrates the importance both of grasping the preliminary conception of facts, and of keeping it clear from the supervening questions of right. The finder's right starts from the absence of any *de facto* control at the moment of finding. And decisions which seem contradictory must not be pronounced to be really so before we have attended to the possibility of differences of fact, which though minute in

⁸ *Harms (Incorporated) v. Martans Club*, [1927] 1 Ch. 526, 530. Lord Hanworth M.R. said: 'It is quite obvious that the use of the words "in public" gives rise to a number of difficulties. They are not easy words to define.'

⁹ *Supra*.

¹ Pages 37 *et seq.*

² *Supra*.

themselves may be material in their consequences. Thus in *Bridges v. Hawkesworth*³ the Court did not say that an object dropped by a guest in a private dwelling-house would not be in the custody of the master—"within the protection of his house"—and therefore in his possession; and Patteson J. did say that an innkeeper would have possession in the like case.'⁴

It is not entirely clear whether in the above citation Sir Frederick Pollock bases his argument on the lack of animus on the part of the shopkeeper or on the fact that the necessary corpus of possession is missing, because some customer is more likely to take the parcel first. If we assume that the emphasis is on the second ground—and this seems the more probable, as the caption to this section is 'Evidence of Possession: Goods.'—then we can distinguish the case from other similar cases, not on the ground that the animus of the owner of the land was different, but that the corpus did not exist. I may intend to exclude the customer from the thing, but as a matter of fact I have not got the power or opportunity of doing so.

It is hardly necessary to repeat that this exceedingly interesting theory cannot be found in the judgment itself and is, therefore, not part of the *ratio decidendi* of the case.

Sir John Salmond, in his 'Jurisprudence,' disposes of the case in a few lines⁵: 'In *Bridges v. Hawkesworth* a parcel of bank-notes was dropped on the floor of the defendant's shop, where they were found by the plaintiff, a customer. It was held that the plaintiff had a good title to them as against the defendant. For the plaintiff, and not the defendant, was the first to acquire possession of them. The defendant had not the necessary *animus*, for he did not know of their existence.'⁶

³ *Supra*.

⁴ With all respect to Sir Frederick Pollock, Patteson J.'s reference to the innkeeper can hardly be construed to refer to the question of *de facto* possession. It was made to show that the shopkeeper did not have 'custody'—whatever that word may mean—because he was not liable to the true owner as he would have been if he had been an innkeeper. Thus Patteson J. says, at p. 1080, in the course of the argument: 'If goods were found in an inn, it would be different. There a special property is vested in the innkeeper by reason of his liability.' The words 'by reason of his liability' are omitted in the Law Journal Report.

⁵ (7th ed.), p. 305.

⁶ On p. 304 Sir John Salmond says: 'Notwithstanding some judicial dicta to the contrary it does not seem to be true, either in law or in fact, that the possession of land necessarily confers possession of all chattels that are on or under it; or that the possession of a receptacle such as a box, bag, or cabinet, necessarily confers possession of its contents. Whether the possession of one thing will bring with it the possession of another that is thus connected with it depends upon the circumstances of the particular case. A chattel may be upon my land, and yet I shall have no possession of it unless the *animus* and *corpus possessionis* both exist. I may have no *animus*; as when my neighbour's sheep, with or without my knowledge, stray into my field. There may be no *corpus*;

Thus Sir John Salmond bases his theory of the case, not on the fact that the notes were in a shop open to the public, but on the lack of knowledge of their existence on the part of the shopkeeper. Not knowing that they were there, he could have no *animus* in respect of them. It would follow from this reasoning that the owner of a private house would not have possession of notes which had been lost in his house by a visitor and of which he had no knowledge. It will be submitted below that Salmond's theory of possession is in conflict with the ratio decidendi of the *Elwes*⁷ and *Sharman*⁸ cases and is, therefore, contrary to the established principle of English law on this subject.

It is now possible to sum up the various theories concerning this case.

(1) The judgment itself. 'The notes never were in the custody of the defendant, nor within the protection of his house before they were found, as they would have been had they been intentionally deposited there.'

(2) Lord Russell of Killowen: 'The notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."' "

(3) Mr. Justice Holmes: There was no intent to exclude others from the pocket-book, because there was no intent to exclude others from the place where the pocket-book was.

(4) Sir Frederick Pollock: There was no '*de facto*' control. Some customer was more likely than the shopkeeper or his servants to see the notes and take them up.

(5) Sir John Salmond: There was no *animus* on the part of the shopkeeper, because he did not know of their existence.

There is a sixth possible theory, which the writer of this article suggests with the greatest diffidence in view of the overwhelming weight of authority against him, and that is that the case was incorrectly decided. It does not seem to be possible to distinguish this case from the case of a thing dropped in a private house except on the ground suggested by Sir Frederick Pollock, *viz.*, absence of *de facto* control on the part of the shopkeeper. This is a question of fact, and it is suggested that the shopkeeper does have the necessary control. The average customer who is honest does recognize that the shopkeeper has some claim or duty in relation to the thing lost by turning it over to him for safe keeping. It is true that the customer may claim a right in the

as when I lose a jewel in my garden, and cannot find it again. There may be neither *corpus* nor *animus*; as when, unknown to me, there is a jar of coins buried somewhere upon my estate.'

⁷ *Supra*.

⁸ *Supra*.

thing for himself, but this does not interfere with the fact that the shopkeeper actually does have control.

But for the purpose of this Paper it is immaterial whether or not the sixth theory is correct. The point we wish to make is that it is impossible to find any clear ratio decidendi in *Bridges v. Hawkesworth*,⁹ and that it is not therefore a precedent except for one conclusion, viz., that the occupier of land does not in all cases possess an unattached thing on his land even though the owner of the thing has lost possession of it. It is not permissible to read into the case principles which were not in the minds of the judges, and it is not our duty, in Viscount Dunedin's words, 'to spell out with great difficulty a ratio decidendi in order to be bound by it.' As a moot case the facts, of course, are of great interest, as is shown by the discussions of Mr. Justice Holmes and Sir Frederick Pollock. But even here the case is of doubtful value, for we do not know the size and character of the shop which would be material if the point of de facto control were in issue.

When we turn to the next two leading cases on possession, *Elwes v. Brigg Gas Company*¹ and *Sharman v. South Staffordshire Water Company*,² we find less difficulty in analyzing them. The ratio decidendi of these cases would seem to be clear were it not for the construction placed upon them by Sir John Salmond.

In the *Elwes Case*³ the plaintiff had leased land to the defendants for ninety-nine years, with a reservation to the lessor of all minerals, the defendants being authorized to erect a gasholder. In the course of excavating for the foundations the lessees discovered a prehistoric boat embedded in the soil six feet below the surface. The plaintiff claimed the boat, and Chitty J. held that he was entitled to it.

Sir John Salmond explains the principles on which the case was decided as follows⁴:

'A third case in which a finder obtains no title is that in which he gets possession only through a trespass or other act of wrongdoing. If a trespasser seeks and finds treasure in my land, he must give it up to me, not because I was first in possession of it (which is not the case), but because he cannot be suffered to retain any advantage derived from his own wrong. This seems a sufficient explanation of *Elwes v. Brigg Gas Co.*⁵ "The boat," says Chitty J., "was embedded in the land. A mere trespasser could not have taken possession of it; he could only have come at

⁹ *Supra.*

² *Supra.*

⁴ Jurisprudence (7th ed.), p. 307.

¹ *Supra.*

³ *Supra.*

⁵ *Supra.*

it by further acts of trespass involving spoil and waste of the inheritance.” According to the true construction of the lease the tenants, though entitled to excavate and remove soil, were not entitled to remove anything else. They must leave the premises as they found them, save in so far as they were authorized to do otherwise by the terms of their lease.’

But when we turn to the judgment itself we find that Chitty J. based his decision specifically on the ground that the lessor was ‘first in possession,’ which Salmond claims ‘is not the case.’ The learned judge says⁶: ‘The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or a chattel. . . . But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff, for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. . . . The plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff, then, had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference, in the circumstances, that the plaintiff was not aware of the existence of the boat.’

From this citation it becomes obvious, without, it would seem, the possibility of a doubt if it were not for the views expressed by Sir John Salmond, that the basis of the judgment was that the plaintiff was the possessor of the boat because he was in possession of the ground. It is impossible to construe the words in any other way. Nor does the learned judge even suggest as an alternative reason for his judgment that the defendants were trespassers. In quoting from the judgment the sentence about trespass, Salmond is misleading the reader, because he fails to give its context. The reference to the ‘mere trespasser’ was introduced to show how clearly the plaintiff had

⁶ At p. 568.

control of the boat. In other words, it was used to prove the corpus of possession. Thus it is under *de facto* possession that Sir Frederick Pollock discusses this case, and says⁷: 'But it seems preferable to say that the legal possession rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorized interference.'

*South Staffordshire Water Company v. Sharman*⁸ is the last case which it is necessary to consider. The plaintiffs were the owners in fee simple in possession of land covered by a pool. They employed the defendant, together with other workmen, to clean out the pool, and during the operation the defendant found two gold rings in the mud at the bottom of the pool. The plaintiffs sued the defendant in detinue for the recovery of the rings. The county court judge gave judgment for the defendant, holding,⁹ 'on the authority of *Armory v. Delamirie*¹ and *Bridges v. Hawkesworth*,² that the defendant had a good title against all the world except the real owner.' The Divisional Court allowed the appeal and gave judgment for the plaintiffs.

Salmond explains this case as follows³: 'A second limitation of the right of a finder is that, if any one finds a thing as the servant or agent of another, he finds it not for himself, but for his employer. If I instruct a carpenter to break open a locked box for me, he must give up to me whatever he finds in it. This seems a sufficient explanation of such a case as *Sharman's*.⁴ The rings found at the bottom of the pond were not in the company's possession in fact; and it seems contrary to other cases to hold that they were so in law. But though *Sharman* was the first to

⁷ 'Possession in the Common Law,' p. 41. The rest of the passage reads: 'In the case of the prehistoric boat the freeholder, being in possession, made a lease for ninety-nine years to a gas company, reserving mines, minerals, and watercourses. The company's servants, in excavating for foundations, discovered this boat or rather "dug-out" canoe, which had been under the earth for many centuries. Actual possession, it would seem, had passed to the company by the lease, and at all events it was acquired when their servants removed the canoe from the soil. But the company had no right, it was held, to retain the canoe against the freeholder; for he had the prior right to possession and had not divested himself of it by granting the possession and use of the soil for a special purpose. The Roman lawyers, who required a "possidendi affectus" directed to the specific thing, would have dealt with this case differently. The Common Law pays more regard to the fact that an occupier's general power to exclude strangers from any part of that which he occupies is independent of his knowledge or ignorance as to the specific contents of that part. Possibly the traditional dignity of the freehold may have something to do with this view, but it would seem that a lessee for years would have had the same right as against a sub-lessee.'

⁸ *Supra*.

⁹ [1896] 2 Q. B. 44.

¹ 1 Str. 504.

² 21 L. J. Q. B. 75.

³ Jurisprudence (7th ed.), p. 307.

⁴ *Supra*.

obtain possession of them, he obtained it for his employers, and could claim no title for himself.'

This may seem 'a sufficient explanation of such a case as *Sharman's*,' but unfortunately for the validity of Sir John Salmond's argument it was not the 'explanation' on which the Court based its judgment. It seems almost poetic justice that Lord Russell of Killowen, who had treated the judgment in *Bridges v. Hawkesworth* with so much imagination, should have had the same method of interpretation applied to his decision, for in the *Sharman Case* he said⁵: 'The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges v. Hawkesworth* is (*sic*) to be found in a passage in Pollock and Wright's *Essay on Possession in the Common Law*, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is *attached to or under that land*,⁶ and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to anyone who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference." That is the ground on which I prefer to base my judgment.'

It is important to note the italicized words 'attached to or under that land.' These are sufficient to cover the *Sharman Case*,⁷ and, therefore, are the basis of the *ratio decidendi*, as the rings were in the mud and were also covered by a pool of water. They were not on the surface of the land, and were not visible to the casual passer-by. These facts must qualify Lord Russell's final statement, in which he departs from the principle stated in the quotation from Pollock and Wright⁸: 'It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and *the things which may be upon or in it*,⁹ then, if something is found on that land, whether by an employer of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.'

⁵ [1896] 2 Q. B. at p. 46.

⁷ *Supra*.

⁹ Italics ours.

⁶ Italics ours.

⁸ [1896] 2 Q. B. at p. 46.

It is necessary to point out that there is a distinction in fact between things which are merely lying on the surface and things which are attached to or under the land. In the first case a passer-by may pick up the thing; in the second there must be an interference with the land itself. It may, therefore, be reasonable to make a distinction in the rules covering these two different circumstances. It is on this ground that *Bridges v. Hawkesworth* and the *Elwes* and *Sharman* cases can be reconciled. The writer of this article, however, does not himself think that the distinction is of sufficient importance in principle to warrant separate rules as to possession.

After having analyzed these three cases at what may seem to be a wearisome length, can we extract any general principles from them? It is submitted that the following two rules can be deduced:—

1. A man possesses everything which is attached to or under the land which he possesses. As Chitty J. said in the *Elwes Case*, a man who is in possession of the ground is in possession 'not merely of the surface, but of everything that lies beneath the surface down to the centre of the earth.' It is true that in the *Sharman Case* Lord Russell of Killowen described this rule as being merely a 'presumption,' but he did not give any reasons for such a limitation. He definitely rejected the view, later suggested by Sir John Salmond, that lack of knowledge on the part of the possessor of the land of the existence of the thing would rebut the presumption. It is difficult to conceive of any set of circumstances under which this rule or presumption would not be applicable.

2. A man does not necessarily possess a thing which is lying unattached on the surface of his land, even though the thing is not possessed by some one else. For this rule the judgment in *Bridges v. Hawkesworth* is a precedent, even though the ratio decidendi of that case is uncertain.

On the other hand, if *Bridges v. Hawkesworth* was incorrectly decided, as has been suggested above, then the rule would read:

2A. An occupier of land possesses those things on his land which are not possessed by some one else. Thus, for example, if the owner of the parcel in *Bridges v. Hawkesworth* had merely placed the parcel for the time being on the floor, the shopkeeper would not have acquired possession, but as soon as the owner lost possession of the parcel, then the shopkeeper would acquire it.

If this view is correct, then it is unnecessary to formulate any further rule as to possession of unattached things on land.

If it is incorrect, and the rule in *Bridges v. Hawkesworth* is right, then it is necessary to attempt to state a further rule by which a distinction can be drawn between those things which the occupier of the land possesses and those which he does not.

When we attempt to state this further rule it is necessary to distinguish between the various theories given above. If we accept the 'exclusion' doctrine of Mr. Justice Holmes the rule will read:

3A. A man possesses everything which is on land from which he excludes the public.

If we accept the 'de facto control' doctrine of Sir Frederick Pollock the rule will read:

3B. An occupier of land possesses those things on his land of which he has de facto control.

If we accept the 'actual knowledge' doctrine of Sir John Salmond, the rule will read:

3C. An occupier of land possesses only those things on his land of which he has actual knowledge and which he intends to possess. This view, as has been pointed out above, is in conflict with the ratio decidendi of the *Elwes* and *Sharman* cases.

Which of the above theories is the correct one seems to be an open question as far as English law is concerned. In the words of Lord Russell of Killowen: 'It is somewhat strange that there is no more direct authority on the question.'

It is hardly necessary to point out in conclusion that no attempt has been made in this Paper to state a general theory of possession or to consider cases other than the three under discussion. These three have been chosen for analysis because so much of the learning on the subject is concerned with them.

PARLIAMENT AND THE DOMINIONS: A RETROSPECT.

R. L. SCHUYLER.

A FEW years ago a distinguished constitutional historian reopened what had once been a burning issue of political controversy, the question of the validity of the authority claimed and exercised by the British parliament over the American colonies. There had always been a difference of opinion respecting the oppressiveness of those acts of parliament against which Americans protested during the years preceding the Declaration of Independence, but with regard to their legality, as determined by precedent, there had come to be a virtual consensus of historical opinion, British and American alike, that parliament was right, and that those who denied its legal authority over the colonies were wrong. What may be called the orthodox view was thus expressed by Osgood in 1907:

British lawyers and officials at home and those who represented the home government in the colonies held that, in law if not in fact, the authority of Great Britain within the dominions was complete. . . . They held that the colonists were in principle as completely subject to parliament . . . as were the local jurisdictions within England itself. In this they were technically correct and were quite in harmony with the principles of English law.¹

This opinion has been challenged by Professor Charles Howard McIlwain in a provocative and historically sensational essay entitled *The American Revolution: A Constitutional Interpretation*, which received the Pulitzer Prize in History for the year 1923. The view set forth in this work is that parliament never possessed lawful authority outside the realm of England, and that those Americans who denied its jurisdiction over the colonies were therefore right. According to Professor McIlwain, its imperial supremacy originated in a usurpation that began during the Puritan Revolution. He lays stress in this connexion upon the act establishing the Commonwealth, passed by the Long Parliament on May 19, 1649, concerning which

¹ *The American Colonies in the Seventeenth Century*, iii, p. 9.

he says not only that it was illegal, but that it was the beginning of 'the direct constitutional antecedents of the American Revolution,'² and 'apparently the first formal assertion by a Parliament of its authority beyond the realm.'³ It is proposed in this article to test the validity of Mr. McIlwain's thesis, to determine, if possible, whether he should be acclaimed as an Athanasius *contra mundum* or cast into outer darkness as a belated heretic. In either case we shall not be ungrateful to him for showing that the historical antecedents of constitutional relations in the British Empire deserve further consideration.

At the outset it should be said that the Commonwealth Act was undoubtedly illegal, as were all of the enactments of the Long Parliament passed after its breach with Charles I in 1642. In that year, shortly before the outbreak of the Civil War, the lords and commons advanced the revolutionary claim that they had the right to enact laws without the personal approval of the king, and after he had refused his assent to a bill that would have deprived him of the control of the militia, the two houses proceeded to pass the measure in the form of an ordinance. In a war of words that preceded the appeal to arms the legality of the Militia Ordinance was denied by the king and affirmed by parliament, the latter asserting that the king's pleasure was exercised and declared in the high court of parliament 'after a more eminent and obligatory manner' than it could be 'by personal act or resolution of his own,' and that what was agreed to in parliament had 'the stamp of the royal authority,' even though his majesty, 'seduced by evil counsel,' should personally oppose it.⁴ This revolutionary claim did not lack support which is likely to impress the student of English constitutional history as sometimes more ingenious than ingenuous. In their efforts to find justification in precedent for radical innovations the lawyers who championed the parliamentary cause, those 'ardent searchers of mouldering records' of whom Maitland speaks, undoubtedly played havoc with history. It would seem that the medieval constitution which they sought to 'restore' existed in their own minds rather than in the middle ages.⁵ Thus Prynne, in his *Sovereigne*

² *The American Revolution*, p. 22.

³ *Ibid.* p. 9.

⁴ The documents in this controversy can be found in Rushworth, *Historical Collections*, Part III (London, 1692), i, pp. 526 *et seq.*

⁵ A suggestive essay by Theodore F. T. Plucknett entitled 'The Lancastrian Constitution' tends to show that the modernity which has been ascribed to the fifteenth-century English constitution as illusory. See *Tudor Studies* (London, 1924), pp. 161—181.

Power of Parliaments and Kingdomes, published by order of the house of commons in 1643, argued on historical grounds that the king in giving his assent to bills merely declared the law which the lords and commons had already made, and he undertook to support by precedent, as well as by considerations of equity, reason and logic, the contention that the king was legally bound to assent to 'bills of common right and justice' passed by the two houses unless he could give such reasons for not doing so as would satisfy them.⁶ The annals of the Puritan Revolution afford abundant and interesting illustration of the distortion that history always suffers when radicals resort to it for proof that they are not innovators. The theory of the parliamentarians that the personal assent of the king was not essential to the validity of legislation was stamped as political heresy at the time of the Restoration. An act of 1660 declared by implication that all of the enactments of parliament from the time of the breach with the king to the Restoration were invalid,⁷ and an act of 1661 expressly held them to be null and void.⁸ By the latter statute it was provided that if any person asserted 'that both Houses of Parliament or either House of Parliament have or hath a Legislative Power without the King,' he should incur the penalties of *praemunire*.

The statute book is a blank from 1642 to 1660. During this interval, of course, much *de facto* legislation was passed by parliament. From March, 1642, to the close of 1648 its enactments, which had the assent of lords and commons, are known as 'ordinances.' On January 2, 1649, an ordinance for the creation of a court to try the king was rejected by the lords, whereupon the commons, two days later, assumed supreme power, declaring, 'That whatsoever is enacted or declared for law by the Commons in Parliament assembled, hath the force of law, and all the people of this nation are concluded thereby, although the consent and concurrence of King or House of Peers be not had thereunto.' After this their enactments are known as 'acts,' the first to bear this title being an act of January 6, erecting a high court of justice for the trial of the king.⁹

It is customary to give the name of parliament to the two

⁶ William Prynne, *The Treachery and Disloyalty of Papists to their Sovereignes, in Doctrine and Practise. Together with the First Part of The Sovereigne Power of Parliaments and Kingdomes* (2nd ed. London, 1643), p. 47; *The Sovereigne Power of Parliaments and Kingdomes*, Part II, pp. 73 *et seq.*

⁷ 12 Car. 2, c. 12.

⁸ 13 Car. 2, c. 1.

⁹ Firth and Rait, *Acts and Ordinances of the Interregnum, 1642-1660*, III, iv, xviii.

houses during the years of their conflict with the crown, and not to withhold it even from that legally disreputable remnant of the house of commons known as the Rump. But we must realize, if we would have accurate ideas about parliament, that it has never had legal existence apart from the king. Parliament at war with the king is to an English lawyer a contradiction in terms. As Dicey reminds us, 'Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the "King in Parliament" and constitute Parliament.'¹ We could view the lords and commons, after their breach with Charles I, as a full and legal parliament only if we were prepared to accept their revolutionary pretence that they were loyal subjects of a king against whom they were actually waging war, and that he was constructively present at their sessions and assented to their acts.² And with the execution of the king even this illegal fiction had to be abandoned, though the revolutionists still professed to be restorers.³ It was during the Civil War that the conception of parliament as an entity distinct from the king had its origin, but this idea, though it was to be perpetuated with very important consequences for the political history of the world, was always, as Professor Pollard remarks, 'a fundamental misconception of the English constitution,' tending 'to falsify history and to render unintelligible the actual working of the constitution of the empire.'⁴

With the collapse of the royalist cause in the year 1648 the Puritan Revolution entered upon its second and undisguisably revolutionary phase. The revolutionists gave up all pretence of loyalty to Charles I, and following his execution the Rump Parliament, by a series of enactments during the first half of 1649, abolished the monarchical constitution of

¹ *Introduction to the Study of the Law of the Constitution* (8th ed.), p. 37.

² The fiction that rebels in arms against their king were his loyal subjects is evidence of the strength of monarchical sentiment and of the spirit of legalism. It was not invented by the English Puritans. The Scotch Covenanters, while engaged in hostilities with Charles I in 1639, professed loyalty to him (Robert S. Rait, *The Parliaments of Scotland*, p. 67). So, also, and with better reason, did the Irish Catholics during the Rebellion of 1641.

³ A striking illustration of the invincible instinct of the Puritans to seek in history a justification for their innovations, to represent revolution as restoration, is afforded by the act of the Rump abolishing the kingship (March 17, 1649). In this culminating act of revolution it was declared that 'a most happy way is made for this Nation (if God see it good) to return to its just and ancient Right of being governed by its own Representatives or National Meetings in Council, from time to time chosen and entrusted for that purpose by the people.' Firth and Rait, *op. cit.* ii, pp. 19—20.

⁴ *The Evolution of Parliament* (2nd ed. London, 1926), p. 259.

England, set up a republican form of government and proclaimed a new doctrine respecting the source of political authority in the empire. The word 'empire' is used here in its modern and familiar sense to designate the aggregate of the communities that owed allegiance to the king of England.⁵ It should be recalled that there was an English empire, though it was not known by that name, long before the founding of oversea colonies in the seventeenth century. Ever since the Norman Conquest the English kings had possessed dominions outside the realm of England, and though some of these—the former French possessions—had been lost before the seventeenth century, others remained under their rule. In addition to the realm of England Charles I's 'empire' included Scotland, Ireland, the Channel Islands, the Isle of Man and the oversea colonies in the new world.⁶

In the Act establishing the Commonwealth, passed on May 19, 1649, it was 'declared and enacted':

That the People of England, and of all the Dominions and Territories thereunto belonging, are and shall be, and are hereby Constituted, Made, Established and Confirmed to be a Commonwealth and Free State: And shall from henceforth be Governed as a Commonwealth and Free State, by the Supreme Authority of this Nation, The Representatives of the People in Parliament, and by such as they shall appoint and constitute as Officers and Ministers under them for the good of the People, and that without any King or House of Lords.⁷

It was thus proclaimed that the dominions belonged to the people of England and were subject to the jurisdiction of their representatives, acting without the concurrence of king or house

⁵ This meaning was not commonly attached to the term before the eighteenth century. The word 'empire' (*imperium*) had been used in England in medieval and early modern times, but it had then connoted independence, especially ecclesiastical independence of the papacy, not the possession of dependencies. This was the sense in which it was used in the Act of Appeals of 1533, in which the realm of England was declared to be an empire. For this use of the word, see F. J. C. Hearnshaw, *Democracy and the British Empire*, s. I. For the history of the term in its modern sense, see *The Scottish Historical Review*, xv, pp. 185—187, and *The American Historical Review*, xxvii, pp. 485—489.

⁶ Like their predecessors the Stuarts claimed to be kings of France also, but this claim had long been no better than a farcical pretence. In *Calvin's Case* (1608), according to Coke's report, the judges were of opinion that though the king of England had 'absolute right' to the kingdom of France, 'yet seeing the King is not in actual possession thereof, none born there since the crown of England was out of actual possession thereof, are subjects to the King of England.' Coke, *Reports* (London, 1826), iv, p. 31. It would have been a nice exercise in legalistic logomachy to reconcile this opinion with the implications of the doctrine of indefeasible hereditary right as held by James I.

⁷ Firth and Rait, *op. cit.* ii, p. 122.

of lords.⁸ This was a formal announcement of a tremendous innovation, for which no precedent can be found before 1649.⁹ When in earlier times the dominions were mentioned in English statutes they were referred to as dominions of the king,¹ or as dominions of the realm,² but since the realm itself was spoken of as one of the king's dominions,³ the variation in phraseology was evidently not intended to indicate any difference in meaning. There was certainly no implication that the dominions belonged to those subjects of the king who happened to reside in England.⁴ But now that there had been substituted for the monarchy a republic, based, in pretence at least, upon the sovereignty of the people, it was necessary that the dominions be claimed as possessions of the English people unless the empire was to be dissolved. The Puritan revolutionists, however anti-monarchical, were not anti-imperialist. They had no thought of letting the dominions go their own way, and when some of the latter showed a disposition to do so, they were subdued by armed force.

But the issue that Professor McIlwain has raised does not turn upon the character of the Long Parliament and its legislation. The question is whether that revolutionary assembly laid the foundations of parliamentary legislation for the dominions. If so, it would have to be conceded that the legal doctrine of the imperial sovereignty of the British parliament, which is accepted to-day by all lawyers and judges throughout the British Empire, was conceived in iniquity.⁵

An examination of the statutes of the Tudor period makes clear beyond doubt that the parliaments which enacted them did not consider that their authority was confined to the realm

⁸ The Rump had already abolished the monarch and the house of lords.

⁹ In acts of January 30 and March 17, 1649, the dominions were referred to as belonging to the people of England.

¹ *E.g.* 25 Hen. 8, c. 19, s. 3; 35 Hen. 8, c. 3, s. 1; 2 & 3 Edw. 6, c. 1, s. 1; 1 Eliz. c. 1, s. 16; 35 Eliz. c. 1, s. 3; 3 Jac. 1, c. 4, s. 9; 3 Car. 1, c. 3, s. 1; 16 Car. 1, c. 8 s. 1.

² *E.g.* 1 Edw. 6, c. 5, s. 1; 1 & 2 Phil. & Mary, c. 8, s. 2; 3 Jac. 1, c. 1, s. 1; 1 Car. 1, c. 1, s. 1.

³ *E.g.* 25 Hen. 8, c. 21, s. 2; 1 Eliz. c. 1, s. 16; 27 Eliz. c. 2, s. 2; 1 Jac. 1, c. 11, s. 1; 16 Car. 1, c. 23, s. 1.

⁴ The term 'British possession' was defined in the Interpretation Act, 1889, as 'any part of Her Majesty's dominions exclusive of the United Kingdom' (52 & 53 Vict. c. 63, s. 18), but the use of this expression is distinctively modern.

⁵ In the words of Dicey, parliament's claim to the possession of 'absolute sovereignty throughout every part of the British Empire' would be admitted as 'sound legal doctrine by any court throughout the Empire which purported to act under the authority of the King.' *Introduction to the Study of the Law of the Constitution* (8th ed.), xxv—xxvi. Legalistically speaking, Dicey's statement remains true, though parliament's power to legislate for the self-governing colonies has been nullified in practice by adverse constitutional usage and is now defunct.

of England. Professor McIlwain takes note of the fact that some of these statutes relating to the royal supremacy in matters ecclesiastical applied expressly to the dominions, but he seeks to reconcile this with his hypothesis that parliament had no right to legislate for them by denying that these acts were really legislative in character. In his opinion they were merely declaratory, affirming a royal authority 'assumed (rightly or wrongly) to have existed from a time beyond legal memory in the right of the Crown along.'⁶ But there are other Tudor statutes applying to the dominions, which cannot be disposed of in this fashion, since they clearly made new law. To these we shall now direct our attention, though our survey must of necessity be fragmentary.

Let us consider first the subject of parliamentary legislation for Wales. Before the year 1536 the Dominion or Principality of Wales was not regarded as forming a part of the realm of England, and, with two exceptions during the reign of Edward II, sent no representatives to parliament.⁷ In the Statute of Wales, enacted in 1284 by Edward I, with the advice of the nobles (*proceres*) of England, it was declared that Wales was annexed and united to the crown of that realm.⁸ Coke, in his report of *Calvin's Case* (1608), said that by this statute 'Wales was united and incorporated into England,'⁹ but in his *Fourth Institute* he laid it down that 'the principality and dominion of Wales was incorporated and united to the realm of England' under Henry VIII.¹ Maitland remarks that it is always difficult to pin Coke to a theory. It is sometimes impossible to pin him to a fact. From the wording of many mediæval English statutes it is clear that Wales, during the middle ages, was regarded as lying outside of the realm of England.² Yet parliament legislated for Wales on many occasions between the time of its conquest by Edward I and its incorporation into the English parliamentary system under Henry VIII. In his famous speech on conciliation with America Burke gave the following summary of this legislation:

⁶ *The American Revolution*, p. 24, n. We need not inquire here whether a distinction can properly be drawn between the right to *declare* law for the dominions and the right to *make* law for them, a distinction that figures prominently in Professor McIlwain's essay.

⁷ W. R. Williams, *The Parliamentary History of the Principality of Wales*, p. iii.

⁸ *Statutes of the Realm*, i, p. 55. Edward I, in the words of Professor Tout (*Edward the First*, p. 119), 'never sought to annex the Principality to England, although he incorporated it with the English crown.'

⁹ *The Reports of Sir Edward Coke* (London, 1826), iv, 37.

¹ *The Fourth Part of the Institutes of the Laws of England* (ed. of 1797), p. 239.

² *E.g.* 2 Hen. 4, c. 17; 5 Hen. 4, c. 15; 2 Hen. 6, c. 4.

Sir, during that state of things, Parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to America. They disarmed the Welsh by statute, as you attempted (but still with more question on the legality) to disarm New England by an instruction. They made an act to drag offenders from Wales into England for trial, as you have done (but with more hardship) with regard to America. By another act, where one of the parties was an Englishman, they ordained that his trial should be always by English. They made acts to restrain trade, as you do; and they prevented the Welsh from the use of fairs and markets, as you do the Americans from fisheries and foreign ports. In short, when the statute-book was not quite so much swelled as it is now, you find no less than fifteen acts of penal regulation on the subject of Wales.³

In 1536 parliament passed the well-known Act of Union with Wales.⁴ The preamble recites that because of the differences in law and language between England and Wales 'some rude and ignorant people have made distinction and diversity between the King's subjects of this realm, and his subjects of the said dominion and principality of Wales, whereby great discord, variance, debate, division, murmur and sedition hath grown between his said subjects.' The act provided that Wales should forever be 'incorporated, united and annexed to and with this . . . Realm of England' and that all persons born in Wales should have, enjoy and inherit all privileges 'within this Realm and other the King's Dominions as other the King's Subjects naturally born within the same, have, enjoy and inherit.' English land law was extended to Wales, and the use of the English language was made compulsory in all Welsh courts. For the marches, which lay between English shires and Welsh shires, it was provided that some of them should be annexed to English shires, some to Welsh shires, and the rest divided

³ *The Works of the Right Honorable Edmund Burke* (Boston, 1869), ii, pp. 148—149. Burke thought that this legislation for Wales had been inexpedient and unstatesmanlike, but he did not question its legality. As an example of the acts of parliament to which he referred mention may be made of a statute of 1534 containing a number of enactments for Wales, one of which was that no person resident in the principality or its marches should come under arms to any court to be held therein, on pain of forfeiture of the arms, fine and imprisonment: 26 Hen. 8, c. 6.

⁴ 27 Hen. 8, c. 26.

into separate shires. Wales was fully incorporated into the English parliamentary system, and provision was made for its future representation by knights and burgesses in the house of commons. What is important for our purpose to notice is that this statute was passed by a parliament in which Wales had no representatives, that it undoubtedly made new law for Wales, and that it was accepted and executed there. It is not known whether Wales was represented in the next two parliaments held after the Act of Union. The first recorded appearance of Welsh representatives in the house of commons is in the parliament of 1542,⁵ and they were present in all later parliaments.

In 1536 another of the king's outlying possessions was given representation in parliament. For more than two hundred years (1347—1558) the town of Calais and its marches were subject to the kings of England. Though Edward III actually acquired this territory by conquest, he and his successors professed to rule over it as a part of the kingdom of France, of which they claimed to be the lawful sovereigns.⁶ Many Englishmen emigrated to Calais, and it has been called the first English colony.⁷ As the seat of the English wool staple it came to be of the greatest commercial importance, and its loss under Mary was felt to be a serious blow to English prosperity. From time to time parliament legislated for Calais and provided for the regulation of the staple there. A statute of 1413 directed that certain revenues of Calais be used to meet local expenditures.⁸ In 1421 it was ordained that the king's coinage should be used there.⁹ In 1449 an act of parliament confirmed the Merchants of the Staple of Calais in all their former privileges.¹ In 1485 a statute was passed relating to actions brought by merchants in the courts of Calais;² and a navigation act of the same year forbade the purchase or sale in Calais of Gascon wine unless imported in English, Irish or Welsh vessels.³

⁵ *Parliamentary Papers*, 1878, lxii, Part I, p. 374. W. R. Williams, *op. cit.* p. iv.

⁶ According to Coke, Calais was 'a part of the kingdom of France, and never was parcel of the kingdom of England, and the Kings of England enjoyed Calais . . . by the same title that they had to France.' *Reports* (ed. of 1826), iv, p. 38.

⁷ G. A. C. Sandeman, *Calais under English Rule* (Oxford, 1908), p. 3, says that 'as a colony it was in a sense unique, for Calais is the only instance of a colony founded on the Greek system—the ousting of the native population in favour of an immigrating community of the conquerors.'

⁸ 1 Hen. 5, c. 9.

⁹ 9 Hen. 5, stat. 1, c. 6.

¹ 27 Hen. 6, c. 2.

² 1 Hen. 7, c. 3.

³ 1 Hen. 7, c. 8. This prohibition applied to England, Wales, Ireland, Calais and Berwick.

More comprehensive and important than any of the foregoing was 'An Act declaring certain Ordinances to be observed in the Town of Calais and Marches of the same,' passed in 1536.⁴ This provided, among other things, for the form of oath to be taken by the king's deputy and by other officials of the town, forbade the exportation of grain and cattle, directed the mayor to cause inquest to be made concerning 'decayed houses' in the town and who owned them, and ordered that no resident of Calais or its marches should keep any 'typplyng or chaifferyng house' unless such a person was born 'within the Realm of England, Wales, Ireland, the said Town and Marches of Calais or within any of them, and can speak the English language used within the said Realm of England . . .' It provided, furthermore, that Calais should be represented in every subsequent parliament by two burgesses, one to be chosen by the deputy and council, the other by the mayor, burgesses and freemen of the commonalty of the town. Writs for the election of two burgesses were issued by the chancery and sent to the deputy of Calais in May, 1536,⁵ and there is evidence to show that they were promptly complied with,⁶ though the first officially recorded appearance of representatives of Calais in the house of commons is in the parliament of 1542. The town was represented in all later parliaments up to and including that of 1555.⁷ It was recovered by the French in 1558.

Let us turn now to the Channel Islands. By an act of 1547 providing for the dissolution of the chantries, passed early in the reign of Edward VI, it was enacted:

that the King our Sovereign Lord shall from the said Feast of Easter next coming have and enjoy to him, his heirs and successors, for ever, all fraternities, brotherhoods, and guilds being within the realm of England and Wales and other the King's dominions, and all manors, lands, tenements and other hereditaments belonging to them or any of them, other than such corporations, guilds, fraternities, companies, and fellowships of mysteries or crafts, and the manors, lands, tenements, and other hereditaments pertaining to the said corporations, guilds, fraternities, companies, and fellowships of mysteries or crafts above

⁴ 27 Hen. 8, c. 63.

⁵ *The Chronicle of Calais, in the Reigns of Henry VII and Henry VIII to the year 1540*, ed. by John Gough Nichols (Camden Society), London, 1846, pp. 166—167.

⁶ *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, ed. by James Gairdner, x, p. 459.

⁷ *Parl. Papers*, 1878, lxii, Part I, pp. 374, 377, 380, 384, 388, 392, 395 396—399.

mentioned, and shall by virtue of this Act be judged and deemed in actual and real possession of our Sovereign Lord the King, his heirs and successors, from the said Feast of Easter next coming for ever, . . .⁸

That the phrase 'other the King's dominions' was not a mere piece of empty formalism is shown by the fact that the king, by letters patent of April 25, 1550, appointed the governor of Jersey and certain other persons to be his commissioners, with full power to sell 'any of our manors, lands, tenements, parsonages, tithes, rents . . . or any other of our rights, titles, possessions, or hereditaments within our said Isle of Jersey, which came or ought to come to us by reason of the act and statute made in our parliament holden at Westminster in the first year of our reign touching the dissolution and conveying to us of Chantries, Colleges, Free Chapels, Guilds and Fraternities and other things mentioned in the same act . . .'⁹

On various occasions in modern times it has been contended that acts of parliament were not binding of their own force upon the Channel Islands even though the latter were expressly mentioned therein, that such acts acquired the force of law in the islands only after formal transmission to them and due registration in their courts; and it has been doubted whether the courts were legally bound to register transmitted acts.¹ The question of whether the registration of an act of parliament was necessary in order to make it binding upon the islands appears to have arisen for the first time in 1698 upon a petition from Jersey to the king in council asking for the suspension of the Navigation Act of 1660. It was then held by the attorney-general that the registration of an act in which Jersey was named was not necessary to make it obligatory there, and that such registration was only for the convenience of the island, an opinion which was concurred in by the committee of the privy council for the affairs of Guernsey and Jersey.² An order in council of May 7, 1806, declared that the registration of an act of parliament transmitted to the islands was not

⁸ 1 Edw. 6, c. 14, s. 7.

⁹ *Ordres du Conseil et Pièces Analogues enregistrés à Jersey* (6 vols. Jersey, 1897—1906), i, pp. 27—28.

¹ *The Rights and Immunities of the Island of Guernsey, most humbly submitted to the Consideration of Government; in a Speech of one of the Magistrates of that Island to the Royal Court there* (London, 1771), pp. iv—vi, 4; *Cobbett's Parliamentary Debates*, v, 629; Charles Le Quesne, *A Constitutional History of Jersey* (London, 1856), pp. 297—298, 389; William Berry, *The History of the Island of Guernsey* (London, 1815), Chap. XV; Abraham Jones Le Cras, *The Laws, Customs, and Privileges, and their Administration, in the Island of Jersey* (London, 1839), pp. x, 11—12.

² Minute of the Lords of the Committee of Council for the Affairs of Guernsey and Jersey, April 28, 1806, quoted in Le Cras, *op. cit.* pp. 70—71.

essential to its operation there;³ and in a report published in 1847 royal commissioners who had been appointed to investigate the subject of criminal law in the Channel Islands said that an act of parliament mentioning Jersey was 'immediately' law there, 'without registration.'⁴ In the rules made at various times by the king in council for the registration of acts of parliament in the islands there was no suggestion that registration should be in any sense discretionary with the local courts.⁵ An order in council of July 1, 1731, provided 'that for the future whenever any Act shall be passed in the Parliament of Great Britain relating to the said islands of Jersey and Guernsey, printed copies of such Acts shall be transmitted by the Clerk of his Majesty's Privy Council as soon as conveniently may be to the Royal Courts of the said Islands, signifying to them at the same time, his Majesty's Pleasure, to Register and Publish the said Acts, and to cause the same to be carried into due Execution.'⁶

The statement, often made, that parliament has never taxed the Channel Islands would seem to need modification in view of the following facts. During the reign of William III provision was made for the establishment of a royal hospital at Greenwich for the relief of disabled seamen, and an act of parliament of 1696 provided that all seamen serving in ships belonging to 'any of the subjects of England, or any other his Majesty's dominions' should pay 'six pence *per mensem* for the better support of the said hospital.'⁷ By an act of 1711 the admiralty was empowered to appoint receivers of this duty and to authorize them to depute the collectors or other officers of the customs 'of the several out ports of this kingdom, and of the ports of the kingdom of Ireland' to collect the same,⁸ but no mention was made of the Channel Islands, the Isle of Man or the oversea colonies. An act of 1729, after reciting that the duty had not been collected in any of these dominions, in spite of the intent of previous statutes, expressly decreed that these statutes should be deemed to extend to all ships belonging to any of the king's subjects within the 'islands of Jersey, Guernsey, Alderney, Sark and Man . . . and within all and every his Majesty's colonies, islands and dominions in

³ Le Cras, *op. cit.* p. 70; Berry, *op. cit.* pp. 224—225.

⁴ *Parl. Papers*, 1847, xv, 'First Report of the Commissioners appointed to inquire into the state of the Criminal Law in the Channel Islands,' p. xi.

⁵ *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, ii, pp. 22—23, 33, 36.

⁶ *Ibid.* iii, pp. 72—73.

⁷ 7 & 8 Gul. 3, c. 21, s. 10.

⁸ 10 Anne, c. 17, s. 3.

America, as well as to those within Great Britain and Ireland,' and that for the future all seamen employed in ships belonging to any of the king's subjects within those islands and colonies should, with certain exceptions, pay the duty. For the collection thereof it gave power to the persons appointed under the act of 1711 as receivers of the duty to appoint collectors in the ports of the said islands and colonies and 'authorized and required' the latter to collect the duty 'in the several ports of the said islands of Guernsey, Jersey, Alderney, Sark and Man . . . and also in the ports of all and every his Majesty's colonies, islands and dominions in America . . .'⁹ An order in council of July 1, 1731, directed that a printed copy of this act should be transmitted to the royal courts of Jersey and Guernsey, which were required to register and publish the act and cause it to be executed. It was duly registered by the royal court of Jersey, and presumably the same procedure was followed in the other Channel Islands.¹

This history of the Isle of Man, which, like the Channel Islands, has never been a part of the realm of England, yields some data of significance for our purpose. Man was a subordinate kingdom, the rulers of which were at one time subject to the kings of Norway, later to the kings of Scotland, and finally to the kings of England.² Early in the fifteenth century Henry IV of England granted the island to Sir John Stanley and his heirs to be held of the crown by a form of feudal tenure, and for a hundred years Sir John and his successors were styled 'kings of Man.' During the reign of Henry VII the king of Man took the title of 'lord of Man,' but the change in title involved no surrender of authority, and the lords of Man continued to enjoy all the rights and prerogatives which their predecessors had possessed until, in 1765, the government of the island was vested in the British crown by act of parliament.³

In 1542 we have a clear case of parliamentary legislation for Man. An English statute of that year provided for the separation of the diocese of Man from the metropolitical jurisdiction of Canterbury and its transfer to that of York.⁴

During the reign of Queen Elizabeth a dispute arose respecting the Manx succession, during the course of which the

⁹ 2 Geo. 2, c. 7.

¹ *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, iii, pp. 70—73.

² Selden, *Titles of Honor* (2nd ed. London, 1631), Part I, Chap. III. For the history of Man, see Spencer Walpole, *The Land of Home Rule*, and A. W. Moore, *History of the Isle of Man*.

³ Manx Society Publications, v, p. 107.

⁴ 33 Hen. 8, c. 31; A. W. Moore, *Sodor and Man*, p. 99.

queen took immediate possession of the island and appointed a governor. The controversy was referred to the lord keeper of the great seal, the chief justices of the queen's bench and common pleas, the chief baron of the exchequer and others of the privy council, who decided, *inter alia*, that the Isle of Man was 'an ancient kingdome of it selfe, and no part of the kingdome of England,' and that general acts of parliament did not extend to the island. But they held that 'by speciall name an act of parliament may extend to it.'⁵ The claimants to the Manx throne at length reached an agreement, and in 1609, James I, by letters patent, granted the island to William, Earl of Derby, a brother of the preceding lord of Man, and his wife. This settlement of the Manx succession was confirmed, with further limitations, by a private act of parliament passed in 1610, entitled 'An Act for the Assuring and Establishing of the Isle of Man.'⁶ Speaking of this episode Spencer Walpole says:

In the interregnum, from 1595 to 1610, the Crown of England had exercised the rights of sovereignty by the appointment of governors; the courts of England had examined and decided the right of succession to the Manx throne; and finally, the Parliament of England had assured and established the island in the Stanley family. In such circumstances, the island might still claim to be an ancient kingdom; it could no longer claim to be an independent kingdom. It was evidently subject to the English Crown, and liable to be regulated by the English Parliament.⁷

In 1651 the Isle of Man surrendered to the armed forces of the Commonwealth, and for nine years it was ruled under authority derived from the revolutionary government of England. Shortly after the Restoration of the Stuarts to the English throne the Stanley dynasty was restored in Man, and presently the question arose whether the Act of Indemnity, passed by parliament in 1660, applied to the island. In this act mention was made of Ireland, Wales, Jersey, Guernsey 'and other his Majesty's Dominions,' but not specifically of Man.⁸ On this ground the restored lord contended that his island did not come within the scope of the act, though even

⁵ Coke, *The Fourth Part of the Institutes of the Laws of England*, chap. 69; 5 Geo. 3, c. 26, preamble.

⁶ Referred to in 5 Geo. 3, c. 26, preamble; *An Abstract of the Laws, Customs, and Ordinances of the Isle of Man*, compiled by John Parr, 1 ed. by James Gell, Manx Soc. Pubs. xii, pp. 45 *et seq.* The text of the act of 1610 is given, pp. 61—64.

⁷ *The Land of Home Rule*, p. 114.

⁸ 12 Car. 2, c. 11, s. 5.

he did not question the right of parliament to legislate for Man if it chose to do so.⁹ In 1663 the judges of England, having been asked by the privy council for their opinion, held that the Act of Indemnity 'did and ought to be understood to extend into the Isle of Man as well as into any other of His Majesty's Dominions and Plantations beyond the Seas,' and that 'being a Publique General Act of Parliament it ought to have been taken notice of by the Judges in the Isle of Man although it had not been pleaded and although there were no Proclamation made thereof.'¹ From the foregoing it appears that Blackstone stood upon solid ground when he said that Man, though a territory distinct from England, was bound by acts of parliament if it was expressly named.²

A good many Tudor statutes, apart from those dealing with ecclesiastical matters, mentioned the dominions in general. An act of 1534 provided that any person rebelliously withholding from the king any of his castles or fortresses within the realm, 'or in any other the King's dominions or marches,' should be deemed guilty of treason.³ A statute of 1544 prescribed the form of the king's title and ordered that it should be accepted by 'all and singular his Grace's subjects and resiants of or within this his Realm of England, Ireland, and elsewhere within other his Majesty's dominions.'⁴ In 1541 it was enacted that all the king's subjects of the realm of England and Wales, Jersey, Guernsey, Berwick and Calais should be pardoned for all heresies, treasons and felonies (with certain exceptions) committed before July 1 of that year.⁵ On July 20 the governor of Jersey wrote to the bailiff and jurats of the island, informing them that the king in his last parliament had granted a general pardon to his subjects 'as well within this his Grace's Realm as other his dominions' and directing them to permit a certain person to enjoy its benefits in Jersey.⁶ In 1547 all persons were forbidden to export horses, without special licence, 'out of this realm, or the dominions of the same' to any place beyond the sea, upon penalty of forfeiture of the property and a fine.⁷ In 1554 it was provided that any person bringing counterfeit

⁹ William Harrison, *Illiam Dhône and the Manx Rebellion, 1651*, Manx Soc. Pubs. xxvi, p. 44.

¹ Order in Council, August 5, 1663, quoted in Manx Soc. Pubs. xxvi, pp. 55—56.

² *Commentaries on the Laws of England*, ed. by William Draper Lewis, i, p. 92.

³ 26 Hen. 8, c. 13, s. 1.

⁴ 35 Hen. 8, c. 3, s. 1.

⁵ 32 Hen. 8, c. 49.

⁶ *Ordres du Conseil et Pièces Analogues enregistrés à Jersey*, i, p. 5.

⁷ 1 Edw. 6, c. 5, s. 1.

coin from abroad 'into this realm, or into any of the dominions of the same' should be deemed guilty of high treason.⁸

To judge from an act of 1536 Tudor parliaments did not scruple even to impose customs duties on the dominions, for it provided that 'every stranger and denizen, which shall ship, send or convey any leather over the sea, out or from any port of this realm, Wales, Cheshire, or other the King's dominions, shall pay like custom for the same as is used to be paid within the port of London,' and it gave authority to the 'customers and comptrollers' of every 'port, haven and creek within this realm, Wales and other the King's dominions,' from which leather might be exported, to appoint 'one able person to tell and number all such leather as shall be at any time there shipped, . . . the same teller taking of every stranger for the telling of every dicker of leather vi d., whereof the same teller to have for his labour ii d., and iv d. to be to the commonalty of the same town and port.'⁹

Several statutes of Elizabeth's reign referred to the dominions and were clearly intended to bind them. An act of 1566 forbade the exportation of live sheep 'out of this realm of England, Wales or Ireland, or out of any the Queen's Highness dominions,' and justices of the peace 'in every county and shire within this realm of England and Wales, and other the Queen's Majesty's dominions' were empowered to hear and determine offences committed in violation of the act.¹ A navigation act of 1571 made it lawful for any of the queen's subjects, for a term of years, 'to bring into this realm, or any other your Highness dominions' such fish of specified varieties as they might happen to take 'by their own fishing in vessels with cross sails.'² By a statute of 1581 all persons were to be adjudged traitors who should attempt to free or withdraw 'any of the Queen's Majesty's subjects, or any within her Highness realms and dominions, from their natural obedience to her Majesty.'³ In 1585 all Jesuits and priests ordained under any authority from the See of Rome were ordered to depart 'out of this realm of England and out of all other her Highness realms and dominions.'⁴

What comes nearest to a formal declaration by a Tudor parliament of the right to legislate for the dominions is to be found in the preamble of Mary's Second Act of Repeal (1554), which swept away all anti-papal legislation of the reigns of

⁸ 1 & 2 Phil. & Mary, c. 11, s. 2.

¹ 8 Eliz. c. 3, ss. 1 and 3.

³ 23 Eliz. c. 1, s. 1.

⁹ 27 Hen. 8, c. 14, ss. 1 and 2.

² 13 Eliz. c. 11, s. 2.

⁴ 27 Eliz. c. 2, s. 1.

Henry VIII and Edward VI. The words are: 'We the Lords Spiritual and Temporal and the Commons, assembled in this present Parliament, representing the whole body of the Realm of England, and the Dominions of the same.'⁵

It is true that in the early period of English colonial expansion parliament did not legislate for the colonies, though it sometimes gave consideration to colonial questions. It may be that the first two Stuart sovereigns, with their lofty conceptions of royal prerogative and their numerous controversies with the house of commons, convinced themselves that the American colonies did not lie within the range of parliamentary authority.⁶ At any rate, when a bill for greater freedom of fishing on the coasts of Newfoundland, New England and Virginia came before the house of commons in 1621, and the opinion was expressed that parliament had the right to legislate for Virginia, one of the king's ministers said that the house ought not to proceed with the bill because it concerned America. The view that he took, apparently, was that the American colonies were dominions belonging to the king personally, not dominions of the crown of England, and that as such they were not subject to the jurisdiction of parliament. A member of the house, in an account which he wrote of the debates of this session, recorded the minister as saying that '*Virginia, New England, Newfoundland, and those other foreign parts of America, are not yet annexed to the Crown of England, but are the King's as gotten by Conquest,*' and that therefore he thought it 'worthy the Consideration of the House, whether we shall here make Laws for the Government of those Parts; for he taketh it, that in such new Plantations the King is to govern it only by his Prerogative, as his Majesty shall think fit . . .'⁷ Sir Edwin Sandys, one of the leaders of the opposition party, said that Virginia, New England and Newfoundland had been annexed to the crown. Another member of the house observed that the bill did not affect the royal prerogative, for, he said, 'what is here done is done but by the King himself; for his Majesty hath a negative Voice, so as he may refuse whether any such Bill may pass or no, though it hath before passed both

⁵ 1 & 2 Phil. & Mary, c. 8, s. 1.

⁶ On the eve of the American Revolution it was urged by Americans who disputed parliament's right to interfere in colonial affairs that James I and Charles I had held this opinion. See, e.g. *Speeches of the Governors of Massachusetts from 1765 to 1775; and the Answers of the House of Representatives to the same* (Boston, 1818), p. 355.

⁷ *Proceedings and Debates of the House of Commons, in 1620 and 1621*, by a Member of that House (2 vols. Oxford, 1766), i, p. 318. See also *Proceedings and Debates of the British Parliaments respecting North America*, ed. by Leo Francis Stock, i (Washington, 1924), pp. 36—37, 39.

houses.’⁸ This speaker held what was undoubtedly the sound legal view, that an act of parliament was an expression of the king’s pleasure, not the expression of a will distinct from or opposed to his. The bill did not become law, though its failure does not seem to have been caused by considerations of constitutionality.⁹ In 1624 the house of commons was petitioned to take into consideration the affairs of the Virginia Company and its colony, but a letter from James I led to the withdrawal of the petition. In this the king took the ground that it was ‘very unfit for the Parliament to trouble themselves with those matters.’ As for the affairs of Virginia, he said, ‘ourself have taken them to heart, and will make it our own worke to settle the quiet, and wellfare of those plantations, and will bee ready to doe anything that may bee for the reall benefitt, and advancement of them.’ The royal order, we are told, ‘was assented to by a general silence, but not without whispers that by such means any business might be taken out of the hands of parliament.’¹ If we possessed full records of parliamentary debates in the early seventeenth century, we should probably find that there was a good deal of discussion on the subject of constitutional relations in the nascent colonial empire.

Even James I and his successor, however, seem to have had no objection to parliamentary legislation for the dominions in general. A statute passed in 1605, shortly after the disclosure of the Gunpowder Plot, provided that on the fifth day of November in every year thanks should be given for the happy deliverance of the king and parliament by all ministers in cathedral and parish churches ‘within this Realm of England and the Dominions of the same,’ and that all inhabitants of ‘this Realm of England and the Dominions of the same’ should always attend church on that day.² By another act of the same year it was made treasonable for any person ‘upon the seas or beyond the seas, or in any other Place within the Dominions of the King’s Majesty’ to attempt to withdraw any of his subjects from their obedience to him, or to reconcile them to the Church of Rome.³ An act of 1625 for the punishment of offences committed on Sunday forbade the holding of ‘meetings, assemblies or concourse of people out of their own Parishes on the Lord’s day within this Realm of England, or

⁸ *Proc. and Deb. of the House of Commons*, cited above, i, p. 319.

⁹ *Ibid.* ii, p. 258.

¹ *Proceedings and Debates of the British Parliaments respecting North America*, i, pp. 65, 67, 68.

² 3 Jac. 1, c. 1, s. 1.

³ 3 Jac. 1, c. 4, s. 14.

any the Dominions thereof, for any sports or pastimes whatsoever.' ⁴

Nor does it seem to have been supposed that the dominions lay beyond the scope of parliament's taxing power. It is true that when direct taxes were levied under James I and Charles I there was an express provision that they should not apply to Scotland, Ireland, Jersey or Guernsey, ⁵ but the dominions were mentioned in the acts granting to these kings the import and export duties known as tonnage and poundage. The grant of these duties to James I was made in the following words:

We your said Commons, by the Advice and Consent of the Lords Spiritual and Temporal in this your present Parliament assembled, and by the Authority of the same . . . do give and grant to you our Supreme Liege Lord and Sovereign, one Subsidy called Tonnage; That is to say, Of every Ton of Wine that is or shall come into this Realm or any your Majesty's Dominions by way of Merchandise, the sum of Three Shillings, and so after that Rate. . . . And also one other Subsidy called Poundage, That is to say, Of all manner of Goods and Merchandise of every Merchant Denizen and Alien carried or to be carried out of this Realm or any your Majesty's Dominions, or to be brought into the same, by way of Merchandise, of the value of every Twenty Shillings of the same Goods and Merchandise, Twelve Pence, and so after the [that] Rate. ⁶

The same language was used in the Tonnage and Poundage Act of Charles I's reign. ⁷

It appears, then, that parliament was legislating for the dominions long before the revolutionary act of 1649, long before the founding of the English colonies in the New World. It is probably true that some of the statutes that have been referred to were not enforced in the dominions, but it has been shown that this was certainly not true of all of them. The question of enforcement, however, is not vital to the argument, for the validity of a law does not depend upon its enforcement or even its enforceability. There have been statutes applying only to the realm of England which have not been enforced, but it would not be asserted that they were invalid on that account. There was no doubt in Coke's mind that

⁴ 1 Car. 1, c. 1, s. 1.

⁵ 3 Jac. 1, c. 26, s. 28; 7 Jac. 1, c. 23, s. 28; 21 Jac. 1, c. 33, s. 28; 1 Car. 1, c. 6, s. 30; 3 Car. 1, c. 8, s. 33; 16 Car. 1, c. 2, s. 20.

⁶ 1 Jac. 1, c. 33, § 1.

⁷ 16 Car. 1, c. 8, § 1.

acts of parliament were binding upon any dominion if it was named or by general words included in the act.⁸

But even if parliament's imperial authority was not revolutionary in the seventeenth century, was it not once so? Was there not a time when its jurisdiction was confined to the realm of England? If we follow the stream of parliamentary history to its sources, shall we not find somewhere an act of usurpation? In an attempt to answer these questions it will be convenient to confine ourselves to a summary survey, in inverse chronological sequence, of parliament's relation to the single dominion of Ireland during the middle ages.⁹

In 1423 a statute was passed applying to Ireland and Wales as well as to England. This required that all wool, woollfells, leather, lead and tin exported from England, Wales and Ireland should be sent to Calais, then under the rule of the English king, as long as the staple of those commodities continued to be located there.¹ In 1413 Irishmen holding offices or benefices in Ireland were forbidden by act of parliament to absent themselves from them.² This was re-enacted in 1422.³ In 1357 an ordinance for Ireland was promulgated by the king with the assent of the council. It is possible, however, that this was not enacted in a parliament, though it was included by the record commissioners in their edition of the statutes,⁴ and it appears in some earlier editions.

In 1353 what is known as the Ordinance of the Staples was made at a great council held at Westminster by the king with the 'counsel and common assent' of the 'prelates, dukes, earls and barons, knights and commons.'⁵ According to the record commissioners this was not entered on the statute roll, but was found on a roll preserved among the parliament rolls in the Tower of London.⁶ It is a comprehensive document containing twenty-eight chapters and filling nearly twelve pages in the folio edition of *The Statutes of the Realm*. It provided that the staple of wool, woollfells, leather and lead for England, Wales and Ireland should be held at designated towns in those countries—for Ireland, at Dublin, Waterford, Cork and Drogheda. Before exportation the commodities mentioned were

⁸ *The Fourth Part of the Institutes of the Laws of England* (ed. of 1797), pp. 281, 287, 351; *The Reports of Sir Edward Coke* (ed. of 1826), iv, p. 30.

⁹ For cases of medieval legislation by parliament for Gascony see 27 Edw. 3, stat. 1, c. 7; 42 Edw. 3, c. 8; 23 Hen. 6, c. 17.

¹ 2 Hen. 6, c. 4.

² 1 Hen. 5, c. 8.

³ 1 Hen. 6, c. 3.

⁴ 31 Edw. 3, stat. 4, *The Statutes of the Realm*, i, p. 357.

⁵ 27 Edw. 3, stat. 2.

⁶ *The Statutes of the Realm*, i, p. 332, note.

to be brought to one of the staple towns, where the duties were to be paid, after which they were to be exported only by foreign merchants, 'and not by Englishmen, Welshmen, nor Irishmen.' In every staple town there was to be a mayor possessing knowledge of the law merchant and two constables with power to arrest and imprison offenders for 'debt, trespass, or other contract.' They were given jurisdiction within the staple towns in all cases touching the staple, and such cases were to be tried by the law merchant and not by the common law or local borough usage.

In 1331 several enactments for Ireland were made by the king with the advice of the council in a parliament held at Westminster. By these it was provided, among other things, that the justiciar of Ireland should not pardon murderers, that sheriffs and coroners should be elected by the counties, that no seneschal of a lord in Ireland should be appointed to any royal office, and that customs collectors should be burgesses of the towns in which they were to collect the customs. These laws were transmitted to the justiciar, chancellor and treasurer of Ireland, with a mandate for their observance and enforcement there, and they were enrolled in the exchequer at Dublin.⁷

In 1323 articles for the reform of government in Ireland, known as *Ordinatio de Statu Terrae Hiberniae*, were enacted by the king in council at Nottingham. The document makes no mention of the presence at this meeting of magnates, knights of the shire or burgesses, but the time had not yet come when a session of the council was clearly distinguished from a parliament; only a few years before this, in 1305, such a session was described in a parliament roll as *plenum parliamentum*, though neither magnates, knights nor burgesses were in attendance.⁸ The *Ordinatio* was entered on the statute roll and is included in the record commissioners' edition of the statutes.⁹ It forbade the purchase by royal officers in Ireland of lands within their bailiwicks without the king's licence, restricted purveyance, provided that merchants might export their goods from Ireland to England and Wales upon certain conditions, regulated fees, and ordained that common-law writs in Ireland should be sealed

⁷ *Statutes and Ordinances, and Acts of the Parliament of Ireland, King John to Henry V*, ed. by Henry F. Berry under the direction of the Master of the Rolls in Ireland (Dublin, 1907), pp. 323—329.

⁸ *Records of the Parliament holden at Westminster on the Twenty-Eighth Day of February, in the Thirty-Third Year of the Reign of King Edward the First*, ed. by Frederic William Maitland under the direction of the Master of the Rolls (London, 1893), p. xxxvi. This volume is commonly cited as *Memoranda de Parlamento*.

⁹ *The Statutes of the Realm*, i, pp. 193—194.

by the great seal of Ireland. It was sent to the chancellor of Ireland with a mandate for its enrollment in the chancery at Dublin and transmission to the king's judges and officers in Ireland, to be published and observed by them.¹

In a parliament at York in 1318 a number of statutes were enacted that applied to Ireland. The purpose of this legislation was indicated in the preamble:

Forasmuch as many people of the realm of England and of the land of Ireland have heretofore often times suffered mischiefs and disherisons, by reason that in some cases where the law failed, no remedy was ordained; and also forasmuch as some points of the statutes heretofore made had need of explanation; our lord King Edward, son to King Edward, desiring that full right be done to his people, in his parliament at York, in three weeks of St. Michael, the twelfth year of his reign, by the assent of the Prelates, Earls, Barons, and the commonalty of his realm there assembled, ordained the acts and the statutes here following, the which he wills to be firmly observed in the said realm and in the said land.²

These statutes were transmitted to the chancellor of Ireland, who was ordered to cause them to be enrolled in the chancery, exemplified under the great seal of Ireland and sent to the several counties of the land, with writs to the sheriffs, commanding them to publish and observe the same.³

The well-known Statute of Merchants was made by King Edward I in his council at a parliament held at Acton Burnel in 1283.⁴ Complaint having been made that it had been misinterpreted to the injury of the merchants, the king in a parliament held at Westminster in 1285 caused it to be rehearsed, and for clarification of its meaning and intent enacted a supplementary statute, which expressly applied to Ireland as well as to England.⁵ This, together with certain other statutes made in England, was transmitted to Ireland to be proclaimed and observed there.⁶

Our last illustration comes from the early part of the reign of Edward I and is a case of taxation. In a 'general parliament' held at Westminster in April, 1275, there were granted to the

¹ *The Statutes of the Realm*, i, 194. *Statutes and Ordinances, and Acts of the Parliament of Ireland*, p. 295.

² *Statutes and Ordinances, and Acts of the Parliament of Ireland*, p. 301.

³ *Ibid.*, p. 297.

⁴ *The Statutes of the Realm*, i, pp. 53, 98.

⁵ *Ibid.*, i, p. 100. *Statutes and Ordinances, and Acts of the Parliament of Ireland*, p. 103.

⁶ *Statutes and Ordinances, and Acts of the Parliament of Ireland*, p. 47.

king export duties of one-half mark on each sack of wool, one-half mark on each three hundred woollfells, and one mark on each last of hides. At first these duties were known as 'the new custom,' but afterwards and for several centuries as 'the ancient custom.'⁷ The text of the original grant is not extant, but its substance is known. From an entry in the fine rolls of Edward I (May 21, 1275)⁸ it would appear that the grant was made by the magnates of the realm at the petition of the merchants of all England, but other contemporary references to it indicate that knights of the shire and burgesses, who are known to have been summoned to this parliament, participated in the grant. In a charter issued by one of the magnates in the parliament, it is stated that the communities of the realm ('communitates eiusdem regni') assented to the tax,⁹ and in a writ to the justiciar of Ireland, the king says that the grant was made by the archbishops, bishops, abbots, priors, earls, major barons, 'and the whole community of our realm' ('et tota communitate regni nostri').¹ Professor N. S. B. Gras, who has written the most reliable history of the early English customs, regards it as established that the knights and burgesses assented to the tax.²

The documents that have been referred to agree that the grant of 1275 applied to Wales as well as to England, and the king promptly appointed certain merchants of Lucca to act as collectors of the duties on wool, woollfells and hides exported from England and Wales.³ The significance of this should not be overlooked. Wales in 1275 was assuredly not a part of the realm of England; in the letters patent appointing the collectors 'terra Walliae' is distinguished from 'regnum Angliae.'⁴ Yet here we have a parliament at Westminster granting taxes to be paid in Wales and provision at once made for their collection.

But our particular concern is with Ireland. The record in the fine rolls indicates that the duties were to be paid on the commodities in question when exported from England, Wales and Ireland. It was provided that certain persons were to be sworn to answer to the king 'de cheskun sak de laine demi mark e de cheskun treis cenx de peaus ke funt un sak demi mark e de cheskun last de quyr un mark ke isteront hors de Reialme ausi

⁷ N. S. B. Gras, *The Early English Customs System*, pp. 59—61.

⁸ This is in French and is printed in *The Parliamentary Writs*, ed. by Francis Palgrave, i, p. 1, and in Gras, *op. cit.*, pp. 223—4. There is an English abstract in *Calendar of Fine Rolls*, i, p. 47.

⁹ *Parl. Writs*, i, p. 2.

¹ *Parl. Writs*, i, p. 1.

² Gras, *op. cit.*, p. 64.

³ *Parl. Writs*, i, p. 381.

⁴ A similar distinction is made in the writ to the justiciar of Ireland, mentioned above.

ben en Hirlaunde en Wales come en Engleterre dedenz franchise et de hors.' ⁵ What might seem to be contradictory evidence, so far as Ireland is concerned, is found in a charter issued in the parliament, on May 19, 1275, by William de Valence, titular earl of Pembroke and half-uncle of the king, who had come into possession, through marriage, of vast estates, including the liberty of Wexford, in Ireland. ⁶ In this the earl, after reciting that duties had been granted to the king on wool, woolfells and hides exported from England and Wales, to be collected in every port, 'as well within liberties as without,' granted for himself and his heirs, that the king should have the same duties on the same commodities when exported from his (the earl's) ports in Ireland, as well within his liberties as without. ⁷ And in a writ sent to the justiciar of Ireland on May 25 the king informed him of the taxes that had been granted on wool, woolfells and hides exported from England and Wales and commanded him to induce the magnates, communities and merchants of Ireland to make a similar grant. ⁸ This might seem to conflict with the evidence of the fine roll and to show that the duties granted in parliament did not apply to Ireland. But in the same writ the king directed the justiciar to admit certain persons who had been deputed to collect the taxes in Ireland, and to aid them in the discharge of their duties. ⁹ Furthermore, letters patent were issued on the same day to all the king's bailiffs of Ireland, notifying them that he had appointed these persons to collect the duties on wool, woolfells and hides *exported from Ireland* and to

⁵ *Parl. Writs*, i, p. 1. Gras, *op. cit.*, pp. 223—4. For an abstract see *Calendar of Documents relating to Ireland, 1252-1284* (ed. by H. S. Sweetman), p. 195.

⁶ *Dictionary of National Biography*, lxi, p. 373. *Calendar of Documents relating to Ireland, 1171-1251*, p. 433.

⁷ The Latin text of this charter is in *Parl. Writs*, i, p. 2, and in Stubbs, *Select Charters* (6th ed.), pp. 451—2. There is an English translation in Adams and Stephens, *Select Documents of English Constitutional History*, pp. 69—70. The king had previously undertaken that the grant which had been made to him by the magnates in parliament should not prejudice the liberties which they enjoyed in their ports. *Cal. Docs. rel. to Ireland, 1252-1284*, p. 194.

⁸ *Parl. Writs*, i, p. 1. 'Et quia volumus quod dicta consuetudo nobis in terra nostra Hiberniae concedatur et simili modo capiatur, Vobis mandamus quod Archiepiscopos, Episcopos, Abbates, Priores, Comites, Barones, Communitates et mercatores de terra predicta, modis quibus expedire videritis, inducatibus ad concedendam nobis consimilem consuetudinem percipiendam in terra predicta in forma predicta.' For an abstract of this document see *Cal. Docs. rel. to Ireland, 1252-1284*, p. 195.

⁹ *Parl. Writs*, i, p. 1. 'Et Lucam de Lukka et socios suos mercatores de Lukka et Bonasium Bonahuty et socios suos mercatores de Florencia quos ad dictam consuetudinem in terra predicta colligendam et capiendam deputavimus admittatis, et sibi in omnibus, tam scilicet super ordinatione sigillorum nostrorum que ad hoc fieri fecimus et vobis transmittimus, quam super aliis que dictum negotium contingunt consulentes sitis et auxiliantes prout iidem mercatores vobis scire facient ex parte nostra.' For an abstract of this document see *Cal. Docs. rel. to Ireland, 1252-1284*, p. 195.

be answerable to him at his exchequer in Dublin, and commanding them to aid the collectors.¹ It thus appears that the king took steps to enforce the payment of the duties in Ireland on the strength of the parliamentary grant alone. Though he desired that a similar grant should be made in Ireland, it seems evident that he did not regard this as necessary to authorize the collection of the taxes there; and, so far as I know, there is no record to show that such a grant was ever made.

There is abundant evidence, however, that the 'new custom' of 1275 was collected in Ireland. On September 22, 1276, the king commanded the collectors of Ireland to render their account of the new duties twice a year to the treasurer of the exchequer at Dublin, and directed the latter to send him a transcript of this account at the end of the year.² In a writ of November 18, 1276, he informed the justiciar of Ireland that the merchants of that country had complained that the collectors had exacted from them ten shillings for each sack of wool on the ground that sacks in Ireland were larger than in England, and he commanded him not to allow more than half a mark to be exacted for each sack till further orders.³ The records of the Irish exchequer prove beyond question that the duties were regularly collected in Ireland,⁴ and they came to be an important item in the king's Irish revenue. Of the total receipts of the Irish exchequer for the twenty-sixth year of the reign, amounting to £4,421 18s. 0d., the custom of 1275 produced £674 13s. 8d.⁵ Sometimes the proceeds of the duties were assigned by the king in payment of his debts.⁶

The conclusion that forces itself upon us from this hasty backward survey is that the jurisdiction of parliament was never

¹ *Parl. Writs*, i, p. 2. 'Rex Omnibus Ballivis, etc., de terra sua Hiberniae ad quos, etc., salutem. Sciatis quod assignavimus Lucam de Lukka et socios suos mercatores de Lukka et Bonausium Bonauti et socios suos mercatores Florentinos Custodes et Ballivos nostros ad percipiendam ad opus nostrum dimidiam marcā de quolibet sacco lanae et dimidiam marcā de singulis trescentis pellicibus lanutis que faciunt unum saccum et unam marcā de qualibet lesta coriorum exeuntibus terram nostram Hiberniae et ad ea facienda que contingunt negotium supradictum quamdiu nobis placuerit. Ita quod nobis inde respondeant ad Scaccarium nostrum Dublinae. Et ideo vobis mandamus quod eisdem mercatoribus in hiis que dictum negotium contingunt consulentes sitis et auxiliantes quotiens iidem mercatores vobis scire facient ex parte nostra. In cujus, etc. Teste ut supra [i.e., Teste Rege]. Et tripplicantur.

² *Cal. Docs. rel. to Ireland, 1252-1284*, p. 234.

³ *Ibid.*, p. 243.

⁴ *Ibid.*, 1285-1292, pp. 9, 25, 58, 61, 72, 132; *ibid.*, 1293-1301, pp. 14, 23, 29, 37, 97, 98, 99, 117, 120, 127, 128, 132, 138, 139, 140, 141, 151, 152, 155, 160, 181, 189, 190, 191, 192, 213, 248, 250, 251, 281, 293, 295, 296, 297, 305, 307, 314, 351, 376.

⁵ *Ibid.*, 1293-1301, pp. 266-267.

⁶ *Ibid.*, 1293-1301, pp. 300-301, 361; *ibid.*, 1302-1307, pp. 68, 101.

confined to the realm of England. From the earliest times parliaments were imperial in the scope of their authority. This view is confirmed by what is known of their procedure with respect to petitions. The answering of petitions, which came in large numbers from outlying dominions of the king—from Ireland, from the Channel Islands, from Gascony—as well as from England, was an important part of the business of parliaments in the late thirteenth and early fourteenth centuries,⁷ and precisely the same kind of action was taken with respect to the former as to the latter. Between the right to answer petitions and the right to legislate no distinction can be drawn that would be valid for a time when statutes were often enacted in response to petitions.

The origin of parliamentary authority over the dominions is to be explained, I am convinced, not on any theory of usurpation, but by the original character of parliaments. The modern British parliament is derived historically from the *parliamenta* of Edward I, but such changes have been wrought during an evolution of six centuries that a portrait of the descendant bears very little resemblance to that sketch of the ancestor which recent research has drawn for us.⁸ As Professor Pollard remarks, 'parliaments in their infancy were much that parliament to-day is not, and little that it is,'⁹ and the same thought was suggested much earlier by Maitland in an essay that was the starting-point of the recent scientific study of early English parliaments, when he said: 'It is hard to think away out of our heads a history which has long lain in a remote past, but which once lay in the future; it is hard to be ever remembering that such ancient terms as *house of lords* and *peers of the realm* were once new terms. . . . We must judge the rolls of Edward I's reign on their own merits without reference to the parliament rolls of his grandson's, or of any later, reign.'¹

We should realize, to begin with, that parliaments were originally, in fact as well as in form, sessions of a royal council. The king was not only an element in their constitution; he was the essential element. The *parliamenta* of Edward I, the pro-

⁷ On the petitions that came before the Lenten parliament of 1305 see Maitland, Introduction to *Memoranda de Parlamento*, pp. lv—lxxv.

⁸ On the nature of early parliaments see Maitland, Introduction to *Memoranda de Parlamento*; McIlwain, *The High Court of Parliament*; Pollard, *The Evolution of Parliament*, chaps. ii—vi; J. F. Baldwin, *The King's Council in England during the Middle Ages*, chap. xii; D. Pasquet, *An Essay on the Origins of the House of Commons* (trans. by R. G. D. Laffan); G. B. Adams, *Council and Courts in Anglo-Norman England*, chap. x.

⁹ Pollard, *op. cit.*, p. 20.

¹ Introduction to *Memoranda de Parlamento*, pp. lxxxiii—lxxxiv.

ceedings of which are recorded in the first volume of the published *Rotuli Parliamentorum*, were formal meetings or parleys of the king's council, and apparently any such meeting was a *parliamentum*. 'It is but slowly,' says Maitland, 'that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned.'² A session of the king's council might or might not be reinforced by the attendance of magnates, whose successors were in time to be known as the house of lords, and elected representatives of the counties and boroughs, the constituent elements of the later house of commons, but their presence was not essential and did not add to the legislative or judicial authority of the assembly. A meeting of the king in council alone was not only a parliament but a 'full' parliament.³ 'The highest tribunal of the realm,' to quote Maitland again, 'is the king in council; it is the king in his council in his parliaments, in the presence of prelates, barons, and other learned men. To deny that it is the king in council is impossible; to deny that it is the king in parliament, or rather that its sessions are parliaments, is impossible.'⁴ Before long parliaments were to become something different from meetings of the king's council, the council was to fall into the background in parliament, its members being reduced to the level of assistants to the lords,⁵ and distinctions were to be drawn between the authority of the council and the authority of parliament. The time was to come when men in the dominions would deny that they were subject to the jurisdiction of parliament while admitting that they were subject to the jurisdiction of the council. But such distinctions could have been made by no one at a time when a parliament was 'no more than the counsellors of the king sitting in a particular kind of session called a parliament.'⁶

It follows from the nature of early parliaments that they could never have been thought of as 'parliaments of England.' Such an expression would have been meaningless. Parliaments were sessions of the council, and the council was the council of the king, not the council of England. The early parliament rolls say much of *consilium regis*, but they do not speak of

² Introduction to *Memoranda de Parlamento*, p. lxvii.

³ *Ibid.*, p. xxxvi. Pollard, *op. cit.*, pp. 33—34. Pasquet, *op. cit.*, pp. 94, 130, 132—134. Adams, *op. cit.*, pp. 309—313.

⁴ Introduction to *Memoranda de Parlamento*, p. lxxxii.

⁵ Pollard, *op. cit.*, chap. xiv.

⁶ Pollard, *op. cit.*, p. 279.

consilium Angliae. 'Those English historians,' says Professor Tout, 'have gravely erred who have described the Norman or Angevin chancery as the "chancery of England." It was the chancery neither of England nor Normandy, neither of Anjou nor of Aquitaine. It was the king's chancery, and its acts had equal authority in all parts of his dominions.' ⁷ The chancery followed the court, and when the Plantagenet kings were in residence in their French possessions it functioned there as a matter of course.⁸ What was true of the chancery was equally true of the council. It could act in France as well as in England. If need arose it could be partitioned temporarily; 'part could attend the king abroad or on a campaign; another part could remain at home at the seat of government and give advice to the regent, just as the itinerating council could give advice to the king.'⁹ Edward I, when about to leave Gascony in 1289, issued a patent which shows that he regarded his council at Bordeaux 'as an integral part of the "*familia regis*," and assumed that this view would be permanently held.'¹ The council did not become less the king's council because some of its sessions, some of its *parliamenta*, were attended by magnates and representatives of English counties and boroughs. In the days of Edward I no subject of the king, whether resident in Ireland, Jersey, Gascony or elsewhere within the king's dominions, would have regarded it as an alien or external or distinctively English authority.

Another fact to be remembered about early parliaments is that representation was not essential to their existence. There were parliaments long before there was a house of commons, and for some time after representatives of the counties and boroughs began to attend their presence was very irregular and was not regarded as necessary. Elected knights and burgesses seem to have been summoned to only a few of the many parliaments of Edward I, and very seldom do they appear to have participated in legislation.² It is doubtful if during this reign they were ever admitted to the council as members or shared in its deliberations. The rolls of parliament speak of assemblies at which it is known that knights and burgesses were not present as 'full' and 'general' parliaments.³ Our earliest description of an

⁷ *France and England*, pp. 70—71.

⁸ T. F. Tout, *France and England*, p. 71.

⁹ Tout, *Chapters in the Administrative History of Mediaeval England*, vol. ii, p. 149.

¹ *Ibid.*, vol. ii, p. 150, note.

² Pasquet, *op. cit.*, chaps. iii and iv.

³ Introduction to *Memoranda de Parlamento*, p. xxxvi. Pasquet, *op. cit.*, pp. 94, 117. Pollard, *op. cit.*, pp. 33—34.

English parliament is found in the late thirteenth-century treatise on English law that goes by the name of *Fleta*. The passage in question occurs in a brief account of the different courts, and may be translated as follows: 'For the king has his court in his council, in his parliaments, in the presence of the prelates, earls, barons, great men and other learned men, where judicial doubts are determined, and when new injuries have arisen new remedies are provided, and justice is there meted out to each one according to his deserts.'⁴ Here, it will be noticed, is no mention of elected representatives. 'As yet, the assent of 'the commonalty of the realm' was not necessary for the enactment of a statute, representation could not be coupled with legislation, and there was no need of a doctrine of 'virtual representation' to justify parliamentary legislation for the dominions. The time was to come when it could be said that parliament's relations to the realm and to the dominions were different because it represented the former, but not the latter. Then it could fairly be argued that the dominions were entitled in justice to representation in parliament.

If we succeed in forgetting 'a history which has long lain in a remote past, but which once lay in the future,' and follow our most reliable guides to a comprehension of the nature of early parliaments, we shall not find it surprising that the highest of all the king's courts, the court which he held in his council in his parliaments, was the supreme tribunal for all his subjects. Nor shall we be disposed to attribute the origin of its jurisdiction over the king's dominions to any act of usurpation. We can, indeed, trace this jurisdiction far beyond the days of Edward I; we can see it in operation long before the term *parliamentum* was first applied to a session of the king's council. The patent rolls of the reign of Henry III show us that the council in the early thirteenth century was the 'final deciding, authorizing and legislating body,'⁵ and that it acted in this capacity for the dominions as well as for the realm.⁶ Much of its work might be described as administrative regulation, but between

⁴ 'Habet enim Rex curiam suam in consilio suo, in Parliamentis suis, praesentibus praelatis, comitibus, baronibus, proceribus, & aliis viris peritis, ubi terminatae sunt dubitationes judiciorum, & novis injuriis emersis nova constituuntur remedia, & unicuique justitia, prout meruit, retribuetur ibidem': *Fleta* (ed. of 1647), Lib. ii, cap. 2.

⁵ Adams, *Council and Courts in Anglo-Norman England*, p. 302.

⁶ See, e.g., *Patent Rolls of the Reign of Henry III, 1216-1225*, pp. 298-299, 497-498. In 1237 the council provided that changes should be made in certain legal writs, and the king commanded the justiciar, magnates and free tenants, of Ireland to observe 'the said provision.' *Calendar of the Patent Rolls, 1232-1247*, pp. 176-177.

such regulation and more general legislation no sharp line can be drawn. As far back as we can go in the history of the council, it appears as the king in action. It exercised authority over the dominions simply because it was the king's council and they were the king's dominions.

CAMBRIDGE LAW JOURNAL

Published Annually by the Cambridge University Law Society.

SUBSCRIPTION PRICE 5s. PER NUMBER

Editorial Board:

Professor P. H. WINFIELD, LL.D., *Chairman.*

A. D. McNAIR, LL.D., *Book Review Editor.*

A. L. GOODHART, LL.M., *Note Editor.*

J. W. BRUNYATE, B.A., Trinity.

A. F. B. COOKE, B.A., Magdalene.

C. J. HAMSON, B.A., Trinity.

R. H. KERSLEY, Trinity Hall.

N. J. MACROBERT, Trinity.

E. G. MOORE, B.A., Trinity.

J. A. PLOWMAN, Gonville and Caius.

H. B. RINGROSE, Trinity Hall.

E. J. SADLER, St. John's.

C. R. N. WINN, B.A., Trinity.

THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

Enquiries should be directed to B. F. MENDEL (Trinity), 1 New Square, Lincoln's Inn, W.C.2, who is Chairman of the Legal Aid Committee of the London Council of Social Service, or to the Secretary of the Free Legal Advice Bureau, Cambridge House, 131 Camberwell Road, S.E.5.

NOTES ON RECENT CASES.

BILL OF EXCHANGE—CHEQUE—‘ACCOUNT PAYEE ONLY’—CUSTOMER—BANK
COLLECTING CHEQUE FOR ANOTHER BANK—NEGLIGENCE—BILLS OF
EXCHANGE ACT, 1882, s. 82.

Importers Co., Ltd. v. Westminster Bank, Ltd. [1927] 2 K. B. 297.
96 L. J. K. B. 919.

P BOUGHT goods from G, a firm in Germany, in payment for which they drew cheques on the National Provincial Bank in favour of G. These cheques they crossed ‘Account payee only,’ and sent to their agent, S, in order that he might hand them over to G. Instead of doing this, S forged G’s indorsement, added his own name underneath, and paid them into his own account with the O. H. Bank in Dresden. The O. H. Bank, which had a drawing account with the Westminster Bank, indorsed them ‘to the order of the Westminster Bank, Ltd., value in account.’ The Westminster Bank indorsed them, and presented them to the National Provincial Bank—the bank on which they were drawn—for payment, which they received and credited to the O. H. Bank. S, meanwhile, had become bankrupt, and the O. H. Bank was insolvent.

P sued the Westminster Bank for money had and received to the plaintiff’s use, and alternatively for damages for the conversion of the cheques.

It was proved in evidence that it is the general custom of banks merely to see that the indorsement is in order. The Westminster Bank submitted in defence that the O. H. Bank was their customer with the meaning of section 82, Bills of Exchange Act, 1882; that they had in good faith and without negligence received payment for their customer, the O. H. Bank; and that, therefore, they were protected by section 82, Bills of Exchange Act, 1882; and that the words ‘account payee only’ did not amount to a direction to them, a collecting bank, as to the disposal of the proceeds after collection.

There were, therefore, two points involved, namely, the meaning of the word ‘customer’ in the Act, and the precise effect of writing ‘account payee only’ across a cheque.

As to the first point, the meaning of the word ‘customer,’ it was held by MacKinnon J. (affirmed by the Court of Appeal) that the word ‘customer’ applied equally to another bank as to a private individual; that the Westminster Bank in fact received payment on behalf of their customer, the O. H. Bank, and not as holders for value; and that, therefore, they were protected by section 82, provided there was on their part no negligence. Whether they could be held to have been negligent or not depended on the second question, namely, whether they were bound to regard the direction contained in the words ‘account payee only.’

There has in the past been some doubt as to the effect of writing ‘account payee,’ ‘account payee only,’ ‘a/c X Y,’ or similar words across a cheque. The words are not recognized as a crossing by the Bills of Exchange Act, 1882. They do not affect the transferability of a cheque (*National Bank v. Silke* [1891] 1 Q. B. 435), and, there being no statutory

authority for their addition, it is submitted that they do not affect its negotiability, and this view is now confirmed by the case under discussion. The words certainly amount to a *direction* to the collecting bank to pay the proceeds only to the named payee, but would appear to place no restriction on his powers of disposing of the proceeds in some other manner, beyond supplying *prima facie* evidence of negligence against him, and thereby depriving him of the protection afforded by section 82, Bills of Exchange Act, 1882, in the event of there being some irregularity (*Akro-kerri Mines, Ltd. v. Economic Bank* [1904] 2 K. B. 465). The only effect of the words would, therefore, appear to be that they should put the collecting bank on its guard, so that, should a person other than the named payee present the cheque for payment, the bank will be deemed negligent if it makes payment without first making proper investigations as to whether the indorsement of the named payee is in proper order. It is clear that a bank which is collecting, not on behalf of the named payee, but merely as agent for another bank, which is itself collecting on behalf of the named payee, is under no such duty of care to the drawer of the cheque, for to hold otherwise would, in the words of Bankes L.J., render 'this class of business altogether impossible.'

For these reasons judgment was given for the defendants in both Courts.

E. G. M.

BILL OF EXCHANGE—FOREIGN BILL—INDORSEMENT VALID BY FOREIGN LAW
—ACCEPTANCE IN ENGLAND—VALIDITY OF INDORSEMENT IN ENGLAND.

Kocchlin et Cie v. Kestenbaum Brothers. [1927] 1 K. B. 616 and 889.
96 L. J. K. B. 675.

E. VIGDERHAUS drew a bill in France on K. in England, which was accepted by K. The bill was made payable to M. Vigderhaus. E. Vigderhaus, with the authority of M. Vigderhaus and acting as his agent, indorsed the bill to the plaintiffs by writing 'E. Vigderhaus' across the back of the bill. The plaintiffs presented the bill for payment to K, who refused payment on the grounds that the bill, having been made payable to 'M. Vigderhaus,' and having been indorsed 'E. Vigderhaus' without anything to show on the face of it that E. Vigderhaus was acting as M. Vigderhaus' agent, was improperly indorsed.

The plaintiffs, therefore, brought this action.

It was proved in evidence that this was a valid indorsement by French law, although doubt has subsequently been expressed as to whether this is an accurate statement of French law.

By section 31, sub-section 3 of the Bills of Exchange Act, 1882, 'a bill payable to order is negotiated by the indorsement of the holder, completed by delivery.' By section 32, sub-section 1 the indorsement must 'be signed by the indorser.' It is clear from this that according to English law this bill was not validly indorsed, and could not be sued upon. The question, therefore, turned on whether the bill, having been validly indorsed in France according to French law, was good in England. Section 72, sub-section 1 declares that 'where a bill drawn in one country is negotiated, accepted, or payable in another . . . the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement

... is determined by the law of the place where such contract was made.' And sub-section 2 declares that 'subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance ... is determined by the law of the place where such contract is made.'

Despite these provisions, however, Rowlatt J., relying on a *dictum* of Vaughan Williams L.J. in *Embiricos v. Anglo-Austrian Bank* [1905] 1 K. B. 677, that 'it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement, valid by the foreign law, but invalid by the law of England,' held that the bills could not be sued on in an English Court, and that nothing in section 72 dispenses with the necessity under section 32 for the actual signature of the named payee; and furthermore, that the acceptor of the bill in England had only contracted to meet the bill provided it bore the signature of the named payee.

On appeal, however, the Court of Appeal reversed this decision, pointing out that the above-quoted *dictum* of Vaughan Williams L.J. is qualified by his further statement that 'it may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though the indorsement be invalid according to ... the local law of England.' The general rule settled by *Embiricos v. Anglo-Austrian Bank*, *supra*, that 'the rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of bills of exchange or cheques by indorsement,' was thereby restored, and judgment accordingly given for the appellants.

E. G. M.

BILL OF EXCHANGE — BANKNOTES — MATERIAL ALTERATION — NUMBER —
ACCIDENT — DESTRUCTION.

The Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.
[1928] W. N. 23.

L PLACED two banknotes, each for \$500, in the pocket of some garment, and, having forgotten that she had done so, proceeded to wash the garment, with the result that the banknotes were partially destroyed. With the assistance of the bank, L succeeded in piecing together the fragments of one of the notes to the satisfaction of all parties; but in the case of the other note concerning which this action was brought, although the process of repair was so far successful as to make plain the name of the bank, the amount which the note represented, the definite promise to pay 'Bearer,' and the signatures of the chief manager and the accountant, it was found impossible to restore the number, and the bank accordingly refused payment.

The case, therefore, turned on whether the bank was liable on a note the number of which had been accidentally defaced.

It is difficult to discover the motives which prompted the bank to refuse payment, but they based their claim in law on section 64, Bills of Exchange Ordinance, 1885, which literally reproduces for Hong Kong section 64, Bills of Exchange Act, 1882. This section runs: 'Where a bill or acceptance is materially altered without the assent of all parties

liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. . . .

'In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.'

It will be observed that the Act makes no mention of the number of a note in this section. It has, however, been held in *Suffell v. Bank of England* (1882) 9 Q. B. D. 555, that owing to its special features the number of a Bank of England note is a material part of the note, although in that case both Brett and Cotton L.JJ. made it clear that the number was no part of the contract.

The case under discussion, however, was distinguished from *Suffell v. Bank of England*, *supra*, on the grounds that in that case the alteration had been fraudulent, whereas in the present case the alteration had been accidental.

For this reason, namely, the fact that the alteration was accidental, the Judicial Committee held that the case was outside the statute, although their Lordships were careful to limit their judgment to the one point that 'in the special circumstances of this case it is possible, by means of the fragments of the document, assisted by verbal evidence, to establish a claim against the bank for \$500 due upon the note.'

E. G. M.

BILLS OF EXCHANGE ACT, 1882, s. 26, SUB-SS. 1, 2—'SIGNATURE OF DRAWER'—'WORDS OF DESCRIPTION.'

Kettle v. Dunster, Wakefield and Others. 43 T. L. R. 770.

THE plaintiff Kettle was receiver for the debenture-holders of the Ford Paper Company. The defendants had accepted bills drawn by the company in respect of goods supplied to them by the company. The plaintiff signed those bills as drawer thus: 'R. Kettle, receiver, Ford Paper Works, Ltd.' He had, however, written to the defendants to the effect that 'it must be clearly understood that I am in no way accepting any liability or responsibility in respect of the orders themselves.'

When the bills were not met, Kettle sued the defendants in his own name. The defendants set up the defence that the surrounding circumstances of the case showed that as Kettle did not intend to make himself a party to and therefore liable upon the bills, he was therefore not entitled to sue them upon those bills.

The Court held (i) there were no such surrounding circumstances, and that (ii) the words 'receiver,' etc., on the bill were words of description only, so that the bills were not, therefore, drawn on behalf of the company. Judgment was entered for the plaintiff.

This case illustrates the distinction between signatures which are construed as being those of an agent or of a person in a representative capacity and those of an individual with a descriptive phrase attached. Before the 1882 Act it was clearly law that an agent was personally liable to third persons unless he expressly stated that he was signing in his

official capacity. He is personally liable unless, to quote Lord Ellenborough in *Leadbitter v. Farrow* (1816) 5 M. & S. 349, 'He says plainly, "I am the mere scribe."' So, too, in *Dutton v. Marsh* (1871) L. R. 6 Q. B. 361 it was held that four directors who signed a promissory note, 'We, the directors of X company do promise to pay J D £1,600 . . . for value received,' were personally liable, although the company's seal appeared in one corner of the note. Cockburn C.J. held that they had only described themselves as directors. But he went on to say: 'Some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note that it was signed by the persons . . . on behalf of the company and not on behalf of themselves. But on consideration I agree that that effect cannot be given to the seal. It may be that it was simply for the purpose of earmarking the transaction, or in fact, showing as to the directors themselves, or between them and the company, it was for the company they were signing the note' (*sic*). If the directors had made it clear that they were signing on behalf of the company, they would not have been so liable.

Since the Bills of Exchange Act the two leading cases are *Chapman v. Smethurst* [1909] 1 K. B. 927, C. A., and *Elliott v. Bax-Ironside* [1925] 2 K. B. 301, C. A. In *Chapman v. Smethurst* the promissory note was stamped 'J. H. Smethurst's Laundry and Dye Works, Ltd.' The signature 'J. H. Smethurst, managing director,' appeared underneath. This was the usual signature of the company used by Smethurst, who as managing director had the authority to act for the company. The Court held that the face of the document supposed the liability of the company. In *Kettle v. Dunster* the face of the bill signified no such supposition. 'R. Kettle, receiver,' etc., was a mere *designatio personae*, so that Kettle himself, under section 26, sub-section 1, was regarded as personally liable. In the *Bax-Ironside Case* the drawer of a bill, drawn on a company, was not satisfied with the acceptance of the company alone. He informed the managing director that he required as a guarantee an indorsement by two of the directors themselves, which was thereupon added. The same directors had already accepted the bill in the name of the company. The Court held them to be personally liable on their indorsements under the construction of section 26, sub-section 2, for to construe the signatures on the face of the bill and on the back as being both the signatures of the company would render the signatures on the back of no effect, since under that sub-section the construction most favourable to the validity of a bill shall be adopted. The directors were presumed to be liable. So again in *Kettle v. Dunster*, the same construction presumed the personal liability of Kettle.

Scrutton L.J., in the *Bax-Ironside Case*, very concisely summed up the principles we have discussed. He divided additions to a signature into two classes: (i) When a man signs for or on behalf of Jones as agent, he is clearly not undertaking personal liability, he is purporting to make Jones liable. (ii) On the other hand, when a man puts after his signature a description for the purpose of showing who he is and how he comes to sign e.g. 'So-and-So, churchwarden,' he is personally liable. He does not mean he is signing as agent. It seems clear that the present case falls under Scrutton L.J.'s second division.

COMPANY—KNOWLEDGE OF DIRECTORS NOT NOTICE TO COMPANY WHERE DIRECTORS HAVE HOSTILE INTEREST—THEREFORE NO ESTOPPEL BY ACQUIESCENCE—DIRECTORS DISTINGUISHED FROM INFERIOR AGENTS—DIFFERENTIATION OF CAPACITY.

J. C. Houghton & Co. v. Nothard, Lowe & Wills, Ltd. [1928] A. C. 1.
97 L. J. K. B. 76.

THE appellant company, a firm of fruit brokers, claimed delivery of the bills of lading for certain cargoes of fruit, of which, in accordance with the custom of the trade, they had obtained delivery from the ships on giving an indemnity and an undertaking to deliver the bills of lading; the respondents counter-claimed for the proceeds of the sale of fruit belonging to them and sold by the appellants. The fruit in question came into the hands of the appellants as a result of a rather complicated transaction.

The essential facts were these: The arrangements for the brokerage of fruit shipped to the respondent company and also of that of another company—the Nothard and Lowe Preserving Company—were made by the same two persons, George and Maurice Lowe, two brothers who were directors of both these companies. The Preserving Company being in financial difficulties, George and Maurice Lowe arranged with the appellants to make large advances, which they used for the purposes of the Preserving Company, and agreed that the appellants might retain the sums received by them from the sale of the fruit not only of the Preserving Company but also of the respondent company. This arrangement was embodied in a contract executed on July 22, 1924, with the appellants by the Preserving Company and, as individual guarantors, by George and Maurice Lowe and a Mr. Prescott, who was secretary of the respondent company. A letter was also written by Mr. Prescott, as secretary of the respondent company, purporting to confirm the agreement on behalf of the respondent company. The arrangement was pursued for some four months before it was repudiated by the respondent company.

On these facts Wright J. gave judgment for the appellants on the ground that G. and M. Lowe had ostensible authority to act for the respondents, but this was reversed by the Court of Appeal. On appeal the House of Lords had to determine whether the arrangement contained in the agreement of July 22 and the letter of the same date bound the company. Regarded as documents, it was abundantly clear that they did not: the Court held that the advances were made to Nothard and Lowe as principals and not as agents for the respondent company, and the agreement between the appellants and Nothard and Lowe was therefore *res inter alios acta* and furthermore of such a character as to be quite beyond the power of a secretary to impose upon the company by a letter written on his own authority not backed by any resolution of the directors.

The further point then arose whether the respondent company should be estopped from denying the existence of, and their consent to be affected by, the arrangement, and it was the opinion of Lord Shaw of Dunfermline that the respondents should be so estopped in pursuance of the judgment of Lord Campbell, C., in *Cairncross v. Lorimer* (1860) 3 Macq. 827, at p. 829: ‘. . . if a man by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition

to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned.' Such conduct on the part of the respondents indicative of acquiescence in the *prima facie* unauthorized dealings with their property by the appellants was found by the learned Lord in the repeated allocations of the agreed percentages 'made to the knowledge of all parties.' The knowledge of the respondents he considered to be established by entries in their ledger so that they 'stood committed in their own books to the 30 plus 70 per cent. arrangement,' and by their failure to repudiate the repeated transactions, which 'committed them to the course of dealing.'

Viscounts Dunedin and Sumner, and Lords Atkinson and Carson, took the opposite view that the respondent company was not estopped from denying the validity of the arrangement of July 22, 1924, since they were not affected with knowledge thereof, or of the ensuing accountings, merely by reason of the knowledge of Messrs. Maurice and George Lowe who, though directors of the respondent company, were parties to the wrong which it suffered, and therefore interested in preventing its disclosure: and furthermore that the omission of the other directors to inspect the accounts being in the circumstances not unreasonable, the company was not thereby affected with knowledge of facts which such inspection would have disclosed.

In discussing the former of these points, Viscount Dunedin said: 'The person who is sought to be estopped is a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons entitled to represent it. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties.' The noble and learned lord then proceeded to distinguish the knowledge of a director himself *particeps criminis*, and to indorse the judgment of Vaughan Williams J. in *Re Hampshire Land Co.* [1896] 2 Ch. 743, that in such a case the knowledge of the guilty officer is not the knowledge of the company, because 'common sense at once leads to the conclusion that it would be impossible to infer that the duty either of giving or receiving notice will be fulfilled where the agent is himself guilty of fraud.'

No reference was made by Viscount Dunedin to the prejudicial entries in the books of the respondent company, but Viscount Sumner regarded these as no more than evidence against the company which did not constitute a representation to the appellants since not communicated to them. He observed that 'the mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action which a fully informed corporation would proceed to take on the strength of it.' On the other hand, in order to impute knowledge to a company it is necessary to show that it was possessed by directors not concerned to suppress it.

The other two noble and learned Lords expressed concurring opinions.

It is most interesting to observe the distinction here drawn in respect

to the requisite conditions for imputing knowledge to a company between directors and mere subordinate officials or servants. English Courts are now following the American Courts in recognizing how fundamental is this differentiation. The truth seems to be that the relation between a corporation and its directors is neither that of principal and agent nor that of *cestui que trust* and trustee, though in some respects akin to both, but a relation *sui generis*. Directors do not, as do agents, exercise their own legal powers on behalf of a principal: they wield the legal powers of the corporation which are vested in them either by the incorporating statute, giving effect to the provisions of a memorandum of association, or by the agreement of the incorporators themselves embodied in articles of association. Persons in whom the powers of a corporation are thus primarily and directly vested, who will in practice be directors, or a president and managing board, or a single superintendent manager, may conveniently be described as *primary representatives*, and are to be distinguished from mere agents or servants of the company who exercise a merely delegated authority. The position of such primary representatives was well described in the New York case of *Bissel v. Michigan Southern R.R.*, 22 N. Y., at p. 267, by Comstock C.J.: 'These corporations had boards of directors in whom were vested every power faculty or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals.' In *Goodspeed v. East Haddam Bank*, 22 Conn. 530, the Supreme Court of Connecticut, in holding a corporation responsible for a malicious prosecution instituted by its directors, said that there was no question of responsibility for the acts of an agent since 'the action was instituted by the bank. . . . The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation . . . and constitute its thinking and acting capacity.' Reference may be made also to *Burrell v. Nahant Bank*, 2 Met. (Mass.) 163; *Maynard v. Firemen's Fund Insurance Co.*, 34 Calif., at p. 55; *Hindman v. First National Bank of Louisville*, 98 F., at p. 562; *American Soda Fountain Co. v. Stolzenbach*, 95 N. J. Law, 721.

The doctrine has been given particular significance by decisions recognizing that participation by the primary representatives of a company in a wantonly flagitious tort committed on behalf of the company renders the company liable in exemplary damages on the ground that it has *itself* been associated in the wrong. In *Bell v. Midland Ry. Co.*, 10 C. B. (n.s.) 287, there had been an obstruction of the entrance to plaintiff's siding as an incident in the deliberate policy of the directors of the defendant company, and exemplary damages were awarded against the company. Cf. *Harris v. Denver and Rio Grande Ry. Co.*, 122 U. S. 597; *Amiable Nancy*, 3 Wheat. 546; *Cleghorn v. N. Y. Central R.R.*, 56 N. Y. 44; *Bishop v. Readsboro' Manufacturing Co.*, 81 A. 454.

Thus the whole question of the criminal liability of a corporation for the acts of its primary representatives, which are on the doctrine of these cases its own acts, is raised but cannot be dealt with in this note.

On the general question of imputing notice to a principal on the ground of the knowledge of a representative, whether a director or a mere agent who acquires the knowledge in the course of his employment by the principal, the law is clear that no such imputation will be made where the representative has an interest in concealing the information from

the principal. It is suggested that this rule can logically be reconciled with the close identification of directors with their companies, seen in the cases above cited, only on the view that a director of a company has a special legal capacity or character as such, distinguishable from his individual capacity or the capacity in which he is director of any other company. A striking case in which such differentiation of capacity was recognized is that of a petition for mandamus presented in Colorado to compel an individual who was secretary of eight separate corporations to permit access to the books of these corporations, for the Court upheld a demurrer on the ground of misjoinder of several causes of action, saying that defendant's representative capacity as secretary of one corporation is a distinct capacity from that in which he is secretary of the others: *Merrill v. Saffa*, 42 Colo. 195. Such differentiation of capacity is given constant recognition in the case of an executor, and, it is submitted, to some extent it is implied in the treatment of trustees. Thus a purchase by a trustee for himself of trust property is merely voidable and not absolutely void as must be a sale in which one and the same person in the same capacity is both vendor and vendee. Again, in *Browne v. Savage*, 4 Drew. 635, it was held that notice to one of several co-trustees will not be notice to all where it is a matter of the assignment of the beneficial interest of the trustee who has notice, which he is therefore interested to conceal. The Trustee Act, 1925, section 28, provides that 'a trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his having acted for the purposes of another trust or estate.'

It is clear from *Re Fenwick, Stobart & Co., Ltd.* [1902] 1 Ch. 507 that where one man acts as secretary of two companies knowledge coming to him as secretary of the A company is notice to him as secretary of the B company only where it is his duty to the B company to communicate the information and such communication will not be a breach of duty to the A company.

In *Re Marseilles Extension Ry. Co.*, L. R. 7 Ch. App. 161, where two directors of company A were also directors of company B, and they had the same solicitor, the B company were held not to be affected by notice of the purpose for which company A borrowed money from company B; and the rule of the principal case is also to be found in *Young v. David Payne & Co., Ltd.* [1904] 2 Ch. 608, and in *Re Hampshire Land Co.* (cited in principal case), where it is said by Vaughan Williams J. (at p. 749) that the knowledge of a common officer of two companies will only be imputed if he is under a duty to the one company to make the communication and to the other company to receive it.

C. R. N. W.

COMPANY—NATIONALITY OF CORPORATION—ACQUISITION OF NEW NATIONALITY *IPSO FACTO* IN ACCORDANCE WITH TREATY OF PEACE WITH AUSTRIA, ARTS. 53, 70, 75, 249 (b), 263—TREATY OF PEACE (AUSTRIA) ORDER, 1920—SIGNIFICANCE OF 'CONTROL' IN CONSIDERING CHARACTER OF CORPORATION.

Bohemian Union Bank v. Administrator of Austrian Property.

[1927] 2 Ch. 175. 96 L. J. Ch. 365.

THE plaintiff bank, incorporated in 1872 under the laws of the Austrian Empire, with its place of registration and principal place of business at Prague, was an Austrian company up to August 9, 1918, when there came into *de facto* existence the independent Republic of Czecho-Slovakia. Under the Treaty of Peace signed at St. Germain-en-Laye on September 10, 1919, Czecho-Slovakia received formal recognition as a free independent and Allied State (Art. 53).

By Art. 249 (b) the Allied and Associated Powers reserved the right to 'retain and liquidate all property rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them. . . .' But by a proviso in the same article, 'Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso facto* in accordance with its provisions the nationality of an Allied or Associated Power . . . will not be considered nationals of the former Austrian Empire.' The defendant did not dispute that all proper notices were given to the correct authority, so that the point for decision by Clauson J. was whether the plaintiff company was right in asserting that within the meaning of the Treaty they acquired *ipso facto* Czecho-Slovakian nationality. He held that they did, and were accordingly exempt from the charge on the property of Austrian nationals.

It was common ground between counsel on both sides that juridical persons might come within the meaning of the expression 'nationals' as used in various parts of the Treaty, though the Court took occasion to remark that ' . . . Nationality cannot in strictness be predicated at all of a corporation, except—as Lord Parker said in *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A. C. 307—by a figure of speech' (at p. 180). Thus Art. 263 referred to 'individuals and juridical persons previously nationals of the former Austrian Empire,' and Art. 272 spoke of a 'change in the nationality' of 'insurance companies whose principal place of business was in (transferred) territory.' The Order in Council of August 13, 1920, in clause 2 defined 'Nationals' as including ' . . . any Company or Corporation incorporated in (any) State according to the law of that State,' but adopted the exemption clause contained in Art. 249 (b) of the Treaty. The defendant, however, contended that no person other than an individual could acquire nationality *ipso facto* under the Treaty, but failed to convince the Court that only individuals could be contemplated by the provision in Art. 70 that 'Every person possessing rights of citizenship ("pertinenza") in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto*, to the exclusion of Austrian nationality, the nationality of the State exercising sovereignty over such territory.' The learned judge was of the opinion that 'citizenship' should be construed as the exact equiva-

lent of 'civil rights,' and so corporations would be within the provision. He further based his judgment on Art. 53, adopting the argument of Sir Patrick Hastings that the effect of the recognition of the independence of Czecho-Slovakia contained in this article was to convert into *de iure* nationality the *de facto* nationality of the individuals and the companies domiciled or having their principal place of business in the transferred territory. 'In so far as a company can have nationality,' it was self-evident to Clauson J. that 'a company which owed its corporate character to the law prevailing in Prague and which had its principal place of business and seat in Prague would become a national of Czecho-Slovakia' (p. 181).

The learned judge says again, at p. 195 of his judgment, that 'it must necessarily be only too plain that a corporate body which owes its very existence to the laws of a particular country and which has its principal place of business in that country must be treated as a national of that country.' It is therefore interesting to compare this test of the nationality of a corporation with the views as to the *enemy character* of a corporation expressed by Lord Parker of Waddington, in the House of Lords, in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co.* [1916] 2 A. C. 307, with the concurrence of Viscount Mersey, Lord Kinnear and Lord Sumner. The respondent company had been incorporated in England with a capital of £25,000 in £1 shares, all but one of which were held by a German company or German individuals resident in Germany. In answer to a summons for judgment the appellant company alleged that the action was commenced without the authority of the respondent company, and the case was decided on this point, but there was a good deal of discussion of a further allegation that the respondent company was an alien enemy company and that payment of the debt would be a trading with the enemy.

In the course of his judgment, Lord Parker said: 'It is only by a figure of speech that a company can be said to have a nationality or residence at all . . . but in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to his residence or commercial domicile.' Enemy character depends on these last, and it therefore seems that in applying the rule against trading with the enemy to artificial as distinct from natural persons attention should be paid to something more than the mere place of registration or incorporation.

The decisive element was declared by the learned Lord to be 'control,' for 'the acts of a company's organs, directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts, and may invest it definitely with enemy character.'

This conception of the nature and activity of a corporation is entirely consistent with the line of cases which affirm the distinction between the legal personality of a corporation and that of any of its corporators or directors. Regarded as legal persons they are distinct, with their own rights and their own duties. As property owners, in especial, or as obligors, they are plainly distinct legal persons; nevertheless certain human beings may so completely control the activities which are in law attributed to the corporation (as being performed by its accredited representatives within the scope of their capacity as members of the corporation and of their authority as its representatives), that their acts will be treated in every way as the company's acts.

The case of *The Roumanian* [1915] P. 26, affirmed [1916] 1 A. C. 124, involved no more than a reaffirmation of the well-established point that the property of a company—in this case a cargo of petroleum—belongs to the legal person of the corporation and not to the shareholders individually. There was no question relating to the acts or national character or contractual capacity of the company, and it was therefore not important that, whereas the company was of German incorporation, the majority of its shareholders were neutrals. Nor indeed is the character of the shareholders, who are not primary representatives, immediately significant, except in respect to the measure of control which they may exercise over the directors and others. See, too, *Janson v. Driefontein Mines, Ltd.* [1902] A. C. 484, 497, 505.

The test suggested by Clauson J. in this case for determining the *nationality* of a corporation is entirely compatible with the test for determining *residence*, and consequently enemy or friendly character, suggested by Lord Parker in the *Daimler Case*. On certain sets of facts the result of applying both tests might be that a corporation would be found to have English nationality but enemy character, but this is a situation in which human persons are not rarely involved in time of war. 'An individual may be of foreign nationality and yet reside in the United Kingdom. So may a company': *De Beers Consolidated Mines, Ltd. v. Howe* [1906] A. C. at p. 458.

In this last case it was held that a company resides for purposes of income tax where its real business is carried on, and that the real business is carried on where the central management and control actually abides.

A corporation is 'resident' within the jurisdiction for the purposes of service of a writ under Ord. IX, r. 8 if it carries on its own business for a substantial period at a fixed place of business within the jurisdiction, through a person who is clearly its representative, and upon whom accordingly service of the writ may be made.

So in *Dunlop P. T. Co., Ltd. v. Actien-Gesellschaft, etc., & Co.* [1902] 1 K. B. 342, the defendant, a foreign corporation, hired a stand at the Crystal Palace and exhibited a car fitted with tyres which plaintiffs alleged to constitute an infringement of their patent. It was held that service of a writ could be made upon the defendant company through their sales representative on the stand. *Per* Collins M.R. at p. 347: 'The true test is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, *that being the only way in which a corporation can "reside" in this country.*'

Cf. *La Compagnie Générale Transatlantique v. T. Law & Co.* [1899] A. C. 431, and *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden A. G.* [1917] 2 K. B. 516, where it was laid down by Vaughan Williams L.J. at p. 522 that 'the corporation must have such a definite place of business as gives it a domicile within this country.'

C. R. N. W.

CONSTITUTIONAL LAW—REMEDIES AGAINST A GOVERNMENT DEPARTMENT.

Rowland and Mackenzie-Kennedy v. Air Council. 43 T. L. R. 717.
 96 L. J. Ch. 470. *Mackenzie-Kennedy v. Air Council.*
 [1927] 2 K. B. 517. 96 L. J. K. B. 1145.

IN these cases the Court of Appeal was able to restate some of the well-understood principles affecting the liability of public officers. They also provided the occasion for the expression of the hope that some early modification in the law would be made. As Atkin L.J. (as he then was) said: 'It is high time that some simplified form of procedure should be introduced.' Scrutton L.J. was no less emphatic.

The latter might well get 'more and more depressed' as the litigation proceeded, for it has lasted eight years, involving three applications to the Court of Appeal. M. was an inventor who, having received compensation for work done during the war, alleged that he was entitled to a further sum as damages for breach of contract and compensation for the user of a patent. So in *Rowland v. Air Council*, 39 T. L. R. 228, his trustee in bankruptcy sued the Air Council, as successor to the Secretary of State for War (with whom the contract was alleged to have been made) for the breach of contract. A preliminary objection that a royal servant is not liable for contracts made by him on behalf of the Crown (*Dunn v. Macdonald* [1897] 1 Q. B. 401, 555; *Macbeath v. Haldimand*, 1 T. R. 172) was upheld by Russell J. But the Court of Appeal considered that the substantive points should be taken.

The action thereupon came before P. O. Lawrence J., who found against the plaintiff both on the facts and on the point of law raised in the previous decision. The Court of Appeal, in *Rowland and Mackenzie-Kennedy v. Air Council*, 43 T. L. R. 717, did not find it necessary to investigate the facts, for they agreed that the Air Council could not in any event be liable upon the contract. The remedy for breach of contract is by petition of right; the remedy for the user of the patent is by petition of right, or by the new procedure under the Patent Rules, 1925. The Air Force (Constitution) Act, 1917, s. 10, which enables the Air Council to sue and be sued in that name does not affect liability; its consequences are purely procedural.

Meanwhile, M. commenced another action for conversion of certain papers and for conspiracy. The Air Council applied to have the statement of claim struck out because (1) it was frivolous and vexatious; (2) it disclosed no ground of action; and (3) the matter was *res iudicata* as a result of Lawrence J.'s decision as above. This came before the Court of Appeal in *Mackenzie-Kennedy v. Air Council* [1927] 2 K. B. 517.

The claim being in tort, no proceedings could be taken against the Crown, either by action or by petition of right: *Tobin v. R.* (1864) 16 C. B. (N.S.) 310. The remedy is against the official who actually commits it, and he cannot plead superior orders as a defence (except possibly where the act is committed against an alien outside the jurisdiction, as in *Buron v. Denman* (1848) 2 Exch. 167). But the superior officer is not responsible for torts committed by his subordinates unless the act was substantially his own: *Raleigh v. Goschen* [1898] 1 Ch. 73; *Bainbridge v. Postmaster-General* [1906] 1 K. B. 178. In the same way, if some only of the members of a Government department, as for instance the Lords of the Admiralty,

commit the tort, then the whole department—the Lords of the Admiralty—cannot be sued for it, even though the members are named individually. In fact, though they are not necessary for the decision, expressions are to be found in *Raleigh v. Goschen* implying that a Government department can never be sued as such, for the obvious intention then is to sue the department as agent of the Crown, so as to make public funds liable. The department has no funds of its own. *Raleigh v. Goschen* is adopted in this sense by Bankes and Atkin L.JJ.

If then we take it that the Air Council is an ordinary unincorporated Government department, the application of the law is plain. The Air Council is being sued as agent of the Crown. Its members are not even individually named. While its individual members may have funds of their own, the Council as such has not. If any of its members have committed a tort, action should be taken against them personally.

The matter is not quite so simple if the department has been incorporated, for then the department itself is the servant of the Crown. It might then be liable as an ordinary servant. The fact that it had no funds would be immaterial, for liability does not depend on capacity to pay, and its lack of funds would not give rise to any greater presumption than would the penuriousness of a civil servant defendant. On the other hand, such a corporation could have no servants, for the servants of the department would be servants of the Crown: *Bainbridge v. Postmaster-General* (*supra*). It could therefore only be sued for torts actually authorised, as, for instance, by a resolution of the board. But even then it might be argued that since the Crown cannot commit a tort, and the department is incorporated to act on behalf of the Crown, any tortious act would be *ultra vires*. Bankes L.J. quotes a statement in this sense of Palles C.B. in *Wheeler v. Public Works Commissioners* [1903] 2 Ir. R. 202. But Atkin L.J. did not think that the doctrine would cover all cases. The point did not, however, arise, since the Court held that the Air Council had not been incorporated.

W. I. J.

CONTRACT—ENGAGEMENT—BREACH—IMPLIED OR EXPRESS OBLIGATION TO ALLOW ACTUAL PERFORMANCE—LOSS OF PUBLICITY—REASONABLE DAMAGE.

Marbe v. George Edwardes (Daly's Theatre) Ltd. and Another.

[1928] 1 K. B. 269. 96 L. J. K. B. 980.

THE plaintiff, an American actress, agreed to rehearse and play a definite part in a named play in London. The defendants agreed to pay her a salary of £100 per week. There was the usual clause forbidding her to perform elsewhere.

Before signing the contract, the plaintiff obtained a promise that she should be advertised prominently.

The plaintiff duly rehearsed and was billed in the manner agreed upon; but on the day of the first performance, exception was taken to her presence by another leading lady, and she was dismissed by the defendants. The defendants admitted their liability to pay the salary, and £2,500 was accepted as representing the sum due on that score.

In this action the plaintiff claimed damages for not being advertised and for not being allowed to appear. (Also there was a claim for libel which.

while it raised some definite points, is, for convenience sake, not discussed here.)

The facts found at the trial included the following: that Miss Marbe was an actress of considerable repute in America, frequently earning more than £100 per week; that it was of the utmost importance to her to appear at Daly's Theatre; and that there had been a collateral agreement to advertise her.

The questions of law involved were twofold, *viz.* (a) under what circumstances may terms be implied in a written instrument? (b) what is the nature and meaning of a theatrical contract?

A.—The general rule is that written instruments are conclusive and exclusive evidence of the intentions of the parties at the moment of contracting: *Goss v. Nugent*, 5 B. & Ad. 64. There are, however, a number of limits to this rule, among which, for the present purpose, two may be noticed:—

(1) Extrinsic evidence is admissible to show the existence of facts which may determine whether an implied term will be read into a contract. 'The law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have' (*per Bowen L.J., The Moorcock* (1889) 14 P. at p. 68). But the law is slow in raising such implications. 'The Court has no right to imply in a written contract any such stipulation unless on considering the terms of the contract in a reasonable and businesslike manner an implication necessarily arises that the parties must have intended that the suggested stipulation should exist' (*per Lord Esher, Hamlyn v. Wood* [1891] 2 Q. B. at p. 491). It was, however, decided in *Krell v. Henry* [1903] 2 K. B. 740, that although no mention was made in the instrument the contract was conditional upon a certain event taking place, *viz.*, in that case, the King's coronation procession.

(2) An oral contract collateral to the written contract and dealing with the same or different subject-matter may be made, provided that the oral contract does not contradict the written one (*Erskine v. Adeane* (1873) 8 Ch. 756; *De Lassalle v. Guildford* [1901] 2 K. B. 215; for bad collateral agreement, see *Henderson v. Arthur* [1907] 1 K. B. 10).

Horridge J. on the trial of the action held that the promise given to advertise plaintiff raised an implied term in the theatrical contract to provide her with actual work and to allow her to perform. (The promise could also clearly have been construed as forming a collateral agreement, in consideration of which the plaintiff signed the contract.) He was therefore of the opinion that although a theatrical contract did not of itself create an obligation to allow the artist to appear (see below), yet by the implied term the plaintiff had a right to perform and consequently on breach of the agreement could recover damages for loss of publicity in addition to her salary.

B.—As to the nature of a theatrical contract. This is a contract of employment, and there were numerous decisions to show that many contracts of employment do not put upon the employer an obligation to find actual work (*Emmens v. Elderton* (1853) 4 H. L. 624), *e.g.* a chauffeur who has been engaged cannot claim to have a car to drive; he has no cause of action provided the stipulated salary is paid. So also all contracts for domestic service, and contracts by way of retainer upon services of a doctor, solicitor, etc. An obligation actually to employ can therefore only be

implied under very special circumstances, *e.g.* wages to be paid on commission basis: *Turner v. Goldsmith* [1891] 1 Q. B. 544. Special circumstances were held not to be found in *Turner v. Sawdon* [1901] 2 K. B. 653, where a representative salesman was engaged to sell cotton goods by travelling with samples and no samples were provided: he could not recover damages beyond his salary, though he showed it was essential to his profession to be actually employed. 'It is within the province of the master to say he will go on paying the wages, but that he is under no obligation to provide work' (at p. 657); Stirling L.J. concurred after much hesitation.

This being the basic rule, the further question to be asked is 'In a theatrical contract as such do there exist special circumstances over and above those present in *Turner v. Sawdon* which make it necessary to imply an obligation of providing actual employment?' The point was in considerable doubt before this present case. First, a distinction was made as to whether there was an inferred stipulation actually to employ; in *Fechter v. Montgomery* (1864) 33 Beav. 22, a reference to an oral agreement in the letter engaging an artist allowed Sir John Romilly M.R. to infer such a stipulation and gave the artist a right to insist upon it. Secondly, an express term in the contract itself agreeing to advertise the artist implied that he must be allowed to perform: *Bunning v. Lyric Theatre* (1894) 71 L. T. 396. In the present action Horridge J. by inferring a term to advertise brought the case under the rule of *Bunning v. Lyric Theatre*. The case of *Grimston v. Cuninghame* [1894] 1 Q. B. 125 went much further; for there it was held (although the decision was given against the actor on other grounds), that an actor engaged on general terms without mention of any particular part was entitled to have a reasonable opportunity of acting and understudying over and above his right to the agreed salary. Against this decision was McCardie J.'s judgment in *Turpin v. Victoria Palace* [1918] 2 K. B. 539, where it was maintained, in a considered opinion, that the customary theatrical contract where there was no stipulation to advertise did not, in spite of a term forbidding appearances at other theatres, involve the employer in an obligation to provide actual work. This judgment seemed to be in agreement with the previous authorities respecting the duties of employers, though definitely in opposition to the *obiter dicta* in *Grimston v. Cuninghame*.

McCardie, J.'s *ratio decidendi* was definitely rejected in the present case by the Court of Appeal. Bankes L.J. distinguished contracts of employment into (a) those in which there was no assurance of work, *e.g.* a contract for domestic service, and (b) that other 'class of contracts which is quite different and in which it is not necessary to introduce any implied term; these are contracts of employment to do a particular specified thing. . . . The engagement of an actress to play a particular part is an instance of this latter class.' In a theatrical contract such as the present there is a direct and express obligation to allow the artist to appear; and on breach of this obligation the artist may receive damages for loss of publicity. Thus, though the appeal from Horridge J.'s judgment was dismissed, the grounds for its dismissal were totally different to the learned judge's '*ratio decidendi*' in the lower Court. The question as to whether an obligation was to be implied or not was entirely superfluous as the obligation was deemed to be express.

Atkin L.J., in reviewing the cases on theatrical contracts, disagreed pointedly with McCardie J.'s judgment, saying (p. 287), 'the agreement

would impose an obligation on the defendants to allow the plaintiff to perform, even if it contained no clause restraining her to perform elsewhere.'

It is therefore now clear that a simple theatrical contract involves the employer in the obligation of allowing actual performance, but the decision is not without difficulty. It is suggested that there are two classes of contracts—those which give, and those which do not give, assurance of work; but the principle selected by Bankes L.J. for deciding into which class a particular contract falls is not clear. For a great many contracts of employment 'to do a particular specified thing' are not currently supposed to involve such an obligation: he however seems to go so far as to hold that a man 'engaged to come and clean windows on a certain day' (p. 279) can claim to be allowed to do that work. More, if the specification 'to do a particular thing' is to be the principle of distinction, the *obiter dicta* in *Grimston v. Cuninghame* (which Atkin L.J., in concurring, approved) are by implication overruled; for there the actor was engaged in general terms without mention of any particular part.

The decision is curious also in the following respect: we have here an agreement, on the part of the defendants to pay a certain salary, on the part of the plaintiff to do a certain work. On the face of the document, it appears that the salary is the only consideration inducing the plaintiff to agree; therefore when the plaintiff has received in full all the benefits she has bargained for—i.e. her salary—she can have no further claim against the defendants. For, clearly, if I agree to take certain goods, I am at liberty, after paying the price, to have them destroyed; and on a simple contract of purchase, no action in respect of that destruction would lie against me. It is contended that, on the face of the present contract, the plaintiff has merely a duty to perform a certain work, if called upon by the defendants, who have a right to claim it; she cannot insist upon the defendants exercising that right, unless there is a further agreement. This point is settled by the cases on contracts of employment quoted above. If the plaintiff pretends that there is a further contract in which it is stipulated that the defendants must exercise their right, the burden of proof lies on her: the contract to exercise that right cannot be deduced from the simple contract of employment. Here the Court of Appeal arbitrarily says that in every theatrical contract of engagement there is the additional contract that the manager must exercise his right, and this additional contract is neither implied nor to be proved, but express and apparent on the face of the document. It would, it is submitted, be more consonant with the authorities to disallow such a construction of the document; the pertinent question is, 'What was the consideration inducing the plaintiff to agree?' If that consideration is fulfilled, the plaintiff has no claim. If the plaintiff argues that (a) the consideration apparent on the face of the document has been fulfilled, but (b) there was a further consideration, she must prove her second statement and the Court will have further to decide whether the collateral agreement can be construed with the written contract. If she proves her contention and the Court holds that it was a valid collateral agreement, then of course she has a right to damages in respect of the breach of this second agreement. It is clear that there are many theatrical contracts where the true consideration is simply the salary; and it is submitted that it would be unjust to involve the manager in any duty beyond the payment of the agreed salary, unless it is clearly shown that he consented to accept further liability.

Miss Marbe was entitled in any event to succeed because of the collateral agreement which was proved and accepted by the lower Court.

Note further that £3,000 was, under the circumstances, held to be a reasonable measure of damages for loss of publicity.

C. J. H.

CONTRACT—AGREEMENT SUBJECT TO CONTRACT—DUTIES OF HOUSE AGENT—
TERMINATION OF AGENCY—SECRET PROFIT.

Keppel v. Wheeler. [1927] 1 K. B. 577. 96 L. J. K. B. 433.

THE plaintiff A instructed the defendant B, a house agent, to offer for sale a block of flats. B received from C an offer for the flats subject to contract; he communicated this offer to A, who accepted it. B was now under no obligation to search for higher offers and honestly thought that his duty to A was ended. So, when he received from D a higher offer, he did not tell A of it, but arranged a resale of the flats from C to D. He, B, got a commission on this resale. Contracts of sale between A and C and between C and D were signed and exchanged; some time after this had been done A heard of the transaction between C and D. It is admitted that B acted in good faith.

A sues B for the difference between the price he got from C and the price he would have got from D if he had been told of D's offer. His ground of action is that B was under a contractual duty to tell him of D's offer. B counterclaims for his commission. Judgment is given for the defendant B on both the claim and the counterclaim, the judge holding that when A accepted C's offer B ceased to be A's agent for the purpose of finding a purchaser. The plaintiff A appeals. The Court of Appeal gives judgment for A on the claim and for B on the counterclaim.

Three questions arise in this case:

- (1) Was the agreement between A and C a valid contract?
- (2) If this agreement was not a valid contract, did the acceptance by A of C's offer terminate B's agency? If not, did it end B's duty of searching for higher offers, and did it end his duty of disclosing to A any higher offer which he got?
- (3) If B had broken his contract in not telling A of D's offer, was he still entitled to his commission on the sale from A to C?

(1) The law on agreements has been settled in a series of cases from *Winn v. Bull* (1879) 7 Ch. D. 29 onwards (for a full account of the cases, see *Williams' Vendor and Purchaser* (3rd ed.), p. 18). The following statement of it by Parker J. in *Von Hatzfeldt v. Alexander* [1912] 1 Ch. 284 has been approved in many subsequent cases (e.g. *Chillingworth v. Esche* [1924] 1 Ch. 97):—

'If the document or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transactions already agreed to will go through. In the former case there is no enforceable contract. . . . In the latter case there is a binding contract and reference to the more formal document may be ignored.'

It often happens that in an agreement to enter into a contract of sale there are essential terms of the proposed contract left unsettled. When this is so the agreement is construed so as to have no legal effect, for the Court will not enforce an agreement to enter into an indefinite contract. Further, since an agreement subject to the settlement of essential terms is of no legal effect, subsequent settlement of these terms will not make the agreement a valid contract. There must be a new contract apart from the original agreement: *Coope v. Ridout* [1921] 1 Ch. 291.

Sometimes there appears at one stage to be a valid contract between the parties, but later letters show that the parties are still negotiating about essential terms. The Court will then consider the document thought to be a contract in relation to the correspondence as a whole, and if there are essential terms being negotiated later, it will treat the document as an agreement subject to the settlement of these terms and so not a valid contract: *Hussey v. Horne-Payne* (1879) 4 A. C. 311; *Bristol Bread Co. v. Maggs* (1890) 44 Ch. D. 616.

As in the present case an agreement to sell is often qualified by the phrase 'subject to contract' or some similar phrase. If there are essential terms still unsettled, such an agreement is not a valid contract. If all the essential terms are settled in the agreement, the phrase 'subject to contract' probably still prevents it from being a valid contract, but there is no actual decision which goes as far as this: *Lockett v. Norman-Wright* [1925] 1 Ch. 56.

Clauses which have been held to be 'the mere expression of a desire' are rare. In *Rossiter v. Miller* (1878) 3 A. C. 1124 there was, in a very complete agreement, a clause 'each purchaser will be required to sign a contract embodying the foregoing orders'; this agreement was held to be a valid contract. In *North v. Percival* [1898] 2 Ch. D. 128, an agreement 'subject to the approval of conditions and forms of agreement by purchaser's solicitor' was held to be a valid contract. But this decision has been much criticized: *Rossdale v. Denny* [1921] 1 Ch. 57.

In the present case there is no doubt that the agreement subject to contract between A and C was not a valid contract.

(2) Did the agreement between A and C, not being a valid contract, terminate B's agency?

If it did not terminate B's agency did it affect B's duties to A under the contract of agency?

A contract of agency will in general terminate when both parties have performed their obligations under the contract. The defendants contended that a house agent has performed his obligations when he has found a purchaser able and willing to pay an acceptable price. They cited in support cases where such an agent has recovered his commission although no sale has taken place. This the agent can do when the negotiations break down because of an unreasonable act of the principal—for instance, his refusal to give a complete abstract of title (*Fisher v. Drewitt* (1878) 48 L. J. Ex. 32), his inability, not known to the agent, to give possession within a reasonable time (*Nosotti v. Auerbach* (1898) 79 L. T. 413), or a burdensome covenant in his title, known neither to the agent nor to himself (*Green v. Lucas* (1875) 33 L. T. 584).

These decisions, although cited by counsel, do not in fact bear on the questions of what the obligations of a house agent are, and of when these obligations come to an end. Each case was decided on the ground that the principal had broken a term, implied in the contract of agency, that

he would not by his own default prevent the agent from earning his commission; the agent recovered his commission as damages for this breach of contract.

The issues can be settled thus. It is the duty of a house agent to get, not only an acceptable offer, but the highest offer that he can. So, until there is a valid contract of sale, his agency is not ended and he is bound to disclose any higher offer that he may get. The Court did not, however, think that he was bound actively to search for new offers after his principal had accepted an offer subject to contract. Presumably the principal is taken to imply, by so accepting, that the agent shall be released from this obligation.

(3) Is B, who has broken his contract and has made a secret commission in so doing (namely, his commission on the sale from C to D), entitled to receive his commission from A?

It is well settled that, when a person acts on behalf of another to whom he stands in a fiduciary relation, he must fully disclose to the other any interest that he himself has in the transaction. If he has not disclosed his interest, or has disclosed it only in part, he is deemed to hold all profits that he makes on trust for the other person: *Imperial Mercantile Co. v. Coleman* (1873) L. R. 6 H. L. 189.

This rule applies to agents acting for their principals, directors acting for their companies, partners acting for each other, and a number of other such persons.

Further, it is well settled that such a person, if he is acting fraudulently in taking a secret profit, ceases to be entitled to his ordinary commission (*Andrews v. Ramsay & Co.* [1903] 2 K. B. 635). If, however, he is acting in good faith, although he still holds his secret profits on trust, he is entitled to his agreed commission. The authority for this rule (*Hippisley v. Knee* [1905] 1 K. B. 1) was not cited in the present case, but the Court followed the rule in holding that B could recover from A his commission on the sale from A to C.

J. W. B.

CONTRACT—CONSTRUCTIVE NOTICE IN COMMERCIAL TRANSACTIONS—
UNDISCLOSED PRINCIPAL.

Greer v. Downs Supply Co. [1927] 2 K. B. 28. 96 L. J. K. B. 534.

A PURCHASED timber from X, ignorant that X was the agent of B. One condition of the contract was that A should set off against the price the amount of a debt owing to him by X; A intended to deal solely with X. In reply to an order from A, X had sent him a letter, signed by himself, but written upon paper bearing the name and address of his principal, B. In answer to A's inquiry, X told him that the name was his, X's, trade name. B, the undisclosed principal, sued A for the price of the timber.

Plaintiff tried to prove that there was a contract between defendant and himself. He alleged that defendant was negligent in not making further inquiries which might have disclosed the agency of X, and must therefore be taken to have known that which he had the means of knowing and to have contracted with plaintiff despite his honest belief that he was contracting with X. The Court of Appeal held that the defendant was under no duty to make further inquiries and was not therefore affected

with constructive notice, expressly affirming the principle of *Manchester Trust v. Furness* [1895] 2 Q. B. 539, 545, in which Lindley, L.J. said: 'In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.'

Although as a general rule an undisclosed principal can sue and be sued on his agent's contract, there are certain important exceptions; in particular, where an agent of an undisclosed principal contracts in such terms as import that he is the real and only principal, the undisclosed principal cannot afterwards sue (*Humble v. Hunter* (1848) 12 Q. B. 310). Plaintiff in the present case could not therefore sue as undisclosed principal since X contracted in a manner which clearly imported that he was the real and only principal.

This case also affirms the classical principle of *Boulton v. Jones* (1857) 2 H. & N. 564 that an offer can only be accepted by someone to whom it was in fact and substance addressed; if the offeree knew that the offeror did not intend to contract with him he cannot adopt and sue on the contract. It is possible, however, that if the offeree were in ignorance that the offeror did not intend to contract with him and the offer could fairly be taken as addressed to him, then the offeror would be estopped from denying the existence of a contract.

In *Pratt v. Willey* (1826) 2 C. & P. 350, Best C.J. held that 'as the name of the plaintiff was on the tickets as the seller of the coals, the defendant ought to have made inquiry into the nature of the position of Surtees, and should not, after that, have dealt with him as principal.' In view of the *ratio decidendi* of the present case this earlier case must be taken to have been overruled unless it can be distinguished on the ground that the facts in that case amounted to actual rather than constructive notice.

E. J. S.

CONTRACT—GAMING TRANSACTIONS.

Ironmonger & Co. v. Dyne. [Times, Jan. 27—Feb. 2, 1928.]

MESSRS. IRONMONGER & Co. sued Mrs. Dyne for the sum of £39,000 due and owing in respect of foreign currency sold by the defendant to the plaintiffs and re-sold by them to her. The defendant pleaded the Gaming Act, alleging that the contracts had reference to gambling transactions. It was contended for the defence that these were not real business transactions at all—they were gambles in foreign currency; that there were no real purchases and sales, and that all that the parties intended was that the sale of the currency, to be delivered at a later date, involved neither liability to deliver nor liability to accept delivery. For the plaintiffs it was contended that it was not sufficient that the defendant never intended to take delivery; they denied any agreement that the defendant was not to be liable to deliver. If it was to be a gamble, both parties had to be gamblers, but there was no evidence that the plaintiffs had put themselves in that position.

The case raises the interesting point as to what exactly constitutes a

gaming contract. In *Thacker v. Hardy* (1878) 4 Q. B. D. 685 the plaintiff was a broker employed by the defendant to speculate for him on the Stock Exchange. To the knowledge of the plaintiff, the defendant did not intend to accept stock bought for him or to deliver the stock sold by him, but expected that the plaintiff would so arrange matters for him that only differences should be payable by him. The plaintiff, on behalf of the defendant, entered into contracts and became personally liable. He sued the defendant for indemnity against the liability incurred by him, and for commission as broker. The defence was that it was a gaming transaction; but it was held not to be such, and the Court of Appeal upheld the decision. Cotton, L.J. said: 'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of uncertain nature; that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win.' Lindley J. said: 'It has been decided that *agreements* [our italics] between buyers and sellers of stocks and shares to pay or receive differences between the prices on one day and the prices on the other, are gaming and wagering transactions.' In this case there was held to be no such agreement, and consequently no gaming contract.

The question again arose and is clearly settled in *Universal Stock Exchange, Ltd. v. Strachan* [1896] A. C. 166. The facts are very similar. The appellants bought from and sold to the respondents various stocks and shares at the 'tape prices' of the day. In no case were stocks and shares ever delivered. The respondent handed to the appellants securities for the performance of his contract, and this action was brought by the respondent to recover the securities, alleging that the transactions were gaming contracts for the payment of differences. The decision again turned on the nature of the transaction. Cave J. said: 'The question which you have to try is whether the transactions were real bargains for the purchase of stock or gambling transactions intended to end in the payment of differences. . . . Notwithstanding the ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that only differences should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities; if there was not that secret understanding, then he is not entitled to recover them.' The jury found that these were gambling transactions, and that the securities should be returned to the plaintiff; and this decision was upheld by the House of Lords. Here again it is seen that the test for a gambling transaction for the payment of differences is not a question of intention of the parties but the presence or absence of an actual agreement as to non-delivery and non-receipt. It is important to note that Cave J.'s first sentence quoted above, that 'the question which you have to try is whether the transactions were real bargains for the purchase of stock or gambling transactions intended to end in the payment of differences,' is misleading if read apart from its context. The intention of the parties is immaterial unless it takes the form of a definite agreement binding upon both parties.

Accordingly, in *Ironmonger v. Dyne*, Horridge J. summed up: 'The defence is that this is a gaming transaction; but one must be careful as to the use of the word "gaming." Every day people speculate on the Stock Exchange without the least intention of taking up the stocks they buy. The question to be decided is, Was there an agreement between the defendants and the plaintiff that in no case should the defendant

have to deliver and in no case should she have to receive, and that the only thing agreed by their contract was that they should respectively receive and pay according to market prices? If there was such an agreement, judgment must be given for the defendant; if there was not, it must be given to the plaintiffs.'

The jury found no evidence of an agreement, and judgment was accordingly entered for the plaintiffs.

J. S. R. C.

CONTRACT—RESTRAINT OF TRADE—SEVERABILITY OF COVENANTS.

Putsman v. Taylor. [1927] 1 K. B. 637; *ibid.* 741 (Court of Appeal).
96 L. J. K. B. 726.

THE defendant was employed by the plaintiff, a tailor carrying on business at three places, A, B and C, in Birmingham, as manager and cutter. The defendant promised, in consideration of the employment, that for five years from the determination of the service he would not (i) set up as a tailor himself, (ii) enter the employment of a named neighbouring trade rival, or (iii) be employed in any capacity with any tailor carrying on business in A, B or C.

The defendant, having left the employment of the plaintiff, entered into the employment of another tailor in A, and the plaintiff sought an injunction.

The County Court Judge held that the whole covenant was void and unenforceable, as involving an undue restraint of trade.

The plaintiff appealed, and the Divisional Court held that the promise not to take service with any tailor in A could be severed from the other promises and enforced, on the ground that it was reasonably necessary to protect the plaintiff against improper use by the defendant of knowledge acquired in the plaintiff's service.

The Court of Appeal affirmed the decision of the Divisional Court, but held that it was unnecessary to consider the question of severability, as in their opinion the whole clause, being limited as to time and space, when read as a whole and properly construed, was not in the circumstances—in particular the circumstance that the defendant was well known in the neighbourhood as an experienced cutter—an unreasonable protection for the plaintiff to require.

This case raises two interesting points:—

- (1) As to how far the Courts will enforce an employee's covenants in restraint of trade.
- (2) As to the severability of such covenants.

(1) The general policy of English law is to discountenance covenants in restraint of trade, but a partial exception exists in the case of the sale of a business, where such covenants are frequently enforced, as the sale of the goodwill is a valuable feature of the bargain, and a covenant for its protection is not by any means necessarily in conflict with the interests of either the vendor or the public.

Formerly such a covenant had to be limited as to the area of the restriction, but with the vast extension of modern business organizations, this has ceased necessarily to be the case (*Maxim-Nordenfelt Gun Co. v. Nordenfelt* [1894] A. C. 535), and the only rule that it now seems possible

to lay down for such cases is the very general one that the covenant must be reasonable from the point of view of each of the parties, and not injurious to the public.

Turning to restrictive covenants in contracts of service, it may be stated as a general principle that all covenants in restraint of trade entered into by an employee with an employer are void unless the employer can prove that such covenants are both necessary for his protection and not unreasonable from the point of view of the employee and the public. The protection therein sought may be either for secret processes used in the employer's business, or with respect to his customers or clients, as in the case of a solicitor's managing clerk who comes into close contact with his employer's clients (*Fitch v. Dewes* [1921] 2 A. C. 158), but it may not be a protection from ordinary competition after the termination of the service, merely on the ground that the employee gained his knowledge of the trade or business from his employment by the covenantee: *Mason v. Provident Clothing and Supply Co., Ltd.* [1913] A. C. 724; *Morris v. Saxelby* [1916] 1 A. C. 688.

(2) A further topic of interest raised by the case is as to the severability of a covenant in restraint of trade contained in a contract of service.

It is impossible to lay down any definite rule as to the cases in which such a covenant will be allowed to be severed, there being a considerable difference of recent judicial opinion.

On the one side there are *dicta* of Lord Moulton in *Mason v. Provident Clothing and Supply Co., Ltd.* [1913] A. C. at p. 745, and Younger L.J. in *Attwood v. Lamont* [1920] 3 K. B. at p. 595, to the effect that severance should not in the general case be allowed, except 'where the excess is of trivial importance, or merely technical,' on the ground that to make severance the general rule would be to allow employers to introduce into contracts of service a wide clause of a penal rather than a protective character, safe in the knowledge that the agreement would still be enforced to as great an extent as they could lawfully have contracted.

On the other side, there is the opinion of Lord Sterndale M.R. in *Attwood v. Lamont*, *supra*, at p. 577, that severance may be effected so long as such severance does not affect the meaning of the part remaining, and the decision of the Divisional Court in the present case that the defendant's promise not to take service with any tailor in A could be severed from the rest of the covenant and enforced, in that it did not affect the original purpose of the covenant, which was to protect the plaintiff against improper use by the defendant of knowledge acquired in the plaintiff's service, but only limited the scope of its operation. This has been called the 'blue pencil' test.

The former view is that which commends itself to reason, and that towards which the tendency of recent judicial opinion seemed to point before the case of *Putsman v. Taylor* came before the Courts; but the second view is supported by a long line of decisions, as instances of which may be cited *Chesman v. Nainby* (1726) 2 Str. 739; *Mallan v. May* (1843) 11 M. & W. 653; and *Bromley v. Smith* [1909] 2 K. B. 235, none of which could have been decided as they were—in favour of the plaintiffs—had the principle of non-severability, except where the excess is trivial, been regarded as law by the judges who decided them.

However, we must confess to a little surprise that the Divisional Court in the case under comment were not more influenced by the judgments of the Court of Appeal in *Attwood v. Lamont*, *supra*.

R. H. K.

CONTRACT—SALE OF GOODS—SHIP—SPECIFIC PERFORMANCE—SALE OF GOODS
ACT, 1893 (56 & 57 VICT. C. 71), ss. 4, 52, 62.

Behnke v. Bede Shipping Co., Ltd. [1927] 1 K. B. 649.
96 L. J. K. B. 325.

As a result of certain communications the plaintiff brought an action claiming specific performance of a contract for the sale of a ship called *The City*, which he alleged was of peculiar value to him. The defendants asserted that the contract was unenforceable on account of section 4 of the Sale of Goods Act, and that in any event it was not a case in which specific performance ought to be decreed.

The alleged unenforceability of the contract on account of section 4 depended on whether a ship is goods within the meaning of that word as used in the Act. Goods, for the purposes of the Act, are described in section 62 as 'all chattels personal other than things in action and money.' Is a ship a chattel personal? 'A ship is clearly a chattel personal, but it is governed by so many special rules that it is doubtful how far it comes under the denomination of goods for the purposes of the Act. The provisions of the Act at any rate can only be applied in an eclectic manner. "A ship," says Turner L.J. (*Hooper v. Gumm* (1867) L. R. 2 Ch. 282, 290), "is not like an ordinary personal chattel, it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships"': Chalmers' Sale of Goods Act (10th ed.), p. 150. This makes it clear that it would be futile to attempt to discover whether the Act applied as a whole and that the applicability of each of its provisions must be considered separately.

In *Re Blyth Shipbuilding and Drydocks Co.* [1926] Ch. 494, a ship was accepted as within the meaning of the term future goods as used in the Act (section 62, sub-section 1), and the appropriate rules contained in sections 16 and 18 as to the time at which property passes were mentioned *obiter* as applicable where the contract itself had no provisions on the subject. The provision of the Act as to when goods shall be regarded as in a deliverable state (section 62, sub-section 4) was applied.

In *Sir James Laing & Sons, Ltd. v. Barclay, Curle & Co.* [1908] A. C. 35 also the provisions of the Act with regard to the moment at which property passes were mentioned *obiter* as applicable to the case of a contract for the sale of a ship. Prior to the decision in the case at present under review, however, there was no direct authority on the question of whether a ship was to be treated as goods for the purposes of section 4.

Wright J. decided that a ship was to be so treated.

Although the defendants' contention on this point prevailed, it did not materially help their case, as it was decided that there was a sufficient note or memorandum to satisfy the section.

There remained to dispose of the question whether the remedy of specific performance was available. It would be expected that such a question would have been decided long ago, but in the words of Wright, J., 'It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship.'

Before the question in its general aspect was dealt with a contention of the defendants which was ingenious and plausible rather than sound was

dismissed. This was based on certain clauses in the contract which gave the plaintiff the option, before payment of the balance of the purchase price, of requiring the defendants to drydock the ship for inspection, and to repair certain damage if found. The defendants contended that as the Court will not decree specific performance of a contract to do work and perform services these clauses constituted a bar to a decree. This contention was fruitless for two reasons. First, the plaintiff had an option; he need not, unless he chose, have the ship drydocked, and he might well not so choose as it would be at his expense if no damage were found. Secondly, defendants were neither drydock owners nor ship repairers; even if the plaintiff insisted on the ship being drydocked, this and any necessary repairs would be executed by other contractors and not by the defendants.

With regard to the general principle of the applicability of specific performance to the sale of goods, section 52 of the Sale of Goods Act enacts that 'in any action for breach of contract to deliver specific and ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on the payment of damages.' The question of whether a ship was specific and ascertained goods within the meaning of this section was not raised, the arguments being directed solely to the question of whether this was a case in which the Court should exercise its discretion.

Although there is no case deciding this question, the following *obiter dictum* from *Hart v. Herwig* (1873) L. R. 8 Ch. 860, is suggestive: 'It is peculiarly a case for the interference of this Court inasmuch as if specific performance were denied to the plaintiff he, practically, would get no justice at all. . . . In fact he has entered into this contract for the purchase of a ship, and he is entitled to the ship.'

According to Fry on Specific Performance (6th ed.), pp. 36 and 37, 'when the chattel in question is unique,' specific performance has been decreed, and 'a ship is probably within this principle.' There is a reference to *Claringbould v. Curtis* (1852) 21 L. J. Ch. 541, in which specific performance was granted in the case of a barge, but there was no discussion of principle. Similarly Halsbury, Laws of England, vol. xxvii, p. 14, says, 'if the goods are of so special a character that money compensation is not adequate,' specific performance is available. 'A ship, as a chattel of unique value, comes within the principle.'

'In the present case there is evidence that *The City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, having been built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now have been sold': *Per Wright J.* at p. 661.

In agreement with the foregoing consideration, Wright J. gave the plaintiff the decree for which he asked, but his decision contained no suggestion of a general principle, and was plainly limited to the case before him.

It is submitted that as the matter now stands, specific performance may be granted of a contract for the sale of a ship, but in each case it must be shown that the ship in question is unique and of special value to the person seeking specific performance.

E. J. S.

CONTRACT—SALE OF GOODS—NOTE OR MEMORANDUM IN WRITING—TIME AT WHICH THE NOTE CAME INTO EXISTENCE—SALE OF GOODS ACT, 1893 (56 & 57 VICT. c. 71), s. 4, SUB-S. 1.

Farr, Smith & Co., Ltd. v. Messers, Ltd. [1928] 1 K. B. 397.
97 L. J. K. B. 126.

Two of the questions raised in this case were:—

- (1) Is a pleading signed by the defendants' counsel a note or memorandum in writing within the Sale of Goods Act, 1893?
- (2) Was a particular pleading in this case in existence before the action was brought?

F and S, who were carrying on business in partnership under the style of Farr, Smith & Co., contracted to buy wood from the defendants. On the day that the contract was completed the plaintiffs explained in a conversation with the defendants that they had not the money to pay for the wood, and that in order to raise it they proposed to form a company—Farr, Smith & Co., Ltd. They further proposed, and the defendants agreed, to consider the contract to exist from that moment as between the defendants and Farr, Smith & Co., Ltd. The defendants failed to carry out the terms of this oral contract. F and S brought an action in their own names, and in the pleadings of the defence this conversation was referred to in detail. Then F and S obtained the leave of the Court to amend their pleadings by substituting Farr, Smith & Co., Ltd. as plaintiffs. The defendants, by their amended defence, contended that there was no note or memorandum in writing as required by section 4 of the Sale of Goods Act, whereupon the plaintiffs relied on the original defence signed by the defendants' counsel.

It was decided, in the case of *Daniels v. Trefusis* [1914] 1 Ch. 788, by Sargant J. that X would be an agent for Y within the meaning of section 4 if X had authority from Y to sign the particular note or memorandum, even though the agent was not intended or authorized to bind his principal by contract. That the principal did not wish a note or memorandum to come into existence by his agent's activities, was held to be irrelevant.

This principle was further extended in the case of *Grindell v. Bass* [1920] 2 Ch. 487. This was also a case of a pleading signed by counsel for the defence, but here it was relied upon not by the plaintiff but by one Earle, who was joined with Bass as defendant after the action had commenced. It was therefore in existence before Earle had become a party to the action. But the importance of the case is that it illustrates that counsel may become an agent within section 4 of the Statute of Frauds when he puts his name to a pleading, even though neither he nor his principal meant to provide such a memorandum.

A further question was whether the memorandum in this case was in existence before the action was brought. In *Lucas v. Dixon* (1888) 22 Q. B. D. 357, there was a dispute over the corresponding section in the Statute of Frauds, and it was decided that an affidavit sworn by the defendant after the writ had been issued could not be relied on as a note or memorandum because it was not in existence before the action was brought. In the present case it was pointed out by Wright J. that if it had not been for the facilities which are provided by the rules of modern

procedure, F and S would not have been allowed to amend their pleadings. Therefore from the legal point of view a new action could be said to have started when they did amend their pleadings. 'Until the proceedings were reconstituted, there was no action to enforce the contract now in issue,' and therefore the original defence could fairly be regarded as having been in existence before the present action was brought.

Judgment for the plaintiffs.

L. G.

CONTRACT—SALE OF GOODS—AUCTION—NOTE OR MEMORANDUM—CATALOGUE
—PRINTED NAME OF AUCTIONEER—DELIVERY UP OF GOODS OR DAMAGES
—SALE OF GOODS ACT, 1893 (56 & 57 VICT. C. 71), ss. 4, 52.

Cohen v. Roche. [1927] 1 K. B. 169. 95 L. J. K. B. 945.

C BOUGHT chairs at an auction from R, an auctioneer. R had circulated copies of the auction catalogue before the sale. The chairs were knocked down to C for £60, and R entered the particulars of the sale in his book. On the left-hand side of each page of the book was pasted a page of the catalogue. On the right-hand side a blank was left for the particulars of the sale. In an action brought by C for the delivery up of the chairs or alternatively for damages for breach of contract, R pleaded that there was no note or memorandum in writing as required by section 4 of the Sale of Goods Act, and that consequently the contract was unenforceable. This case therefore raised two questions:—

- (1) R's name, address and description were printed on the title-page of the catalogue, a copy of which was pasted on to the first left-hand page of R's auction book. Could this printed name be regarded as a signature?
- (2) If the printed name could be regarded as a signature, could it be connected with the particulars of sale so as to constitute a memorandum as required by section 4 of the Sale of Goods Act, 1893?

Section 4 of the Sale of Goods Act, which re-enacts in effect section 17 of the Statute of Frauds, states that: 'A contract for the sale of goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged therewith or his agent in that behalf.'

(1) The defendant's first line of defence was that he had never signed his name anywhere. He admitted that his name and other personal particulars were printed in the manner alleged, but denied that this amounted to a signature. It was decided in *Schneider v. Norris* (1814) 2 M. & S. 286, that where A had sent B an invoice for goods, A's name printed at the top of the invoice amounted to a signature. The reason for this decision was that if A had not meant the printed name to have the same effect as a signature he would not have used a piece of paper with his name printed on it, but a plain piece of paper instead. On the question whether a printed name is a signature which will satisfy the

statute the ratio of *Schneider v. Norris* has been carried so far that it was held in *John Griffiths Cycle Corporation v. Humber & Co., Ltd.* [1899] 2 Q. B. 414 that a signature to a document which contains the terms of a contract is available for satisfying the statute though put *alio intuitu* and not in order to attest or verify the contract. The defendant in the present action, by entering in his book the purchaser's name and the price, had recognized and authenticated his own printed signature.

(2) The second question was whether there was a sufficient note or memorandum in writing. The defendant contended that the parties were not sufficiently shown in the entry made by him in his book, because the identity of the buyer was not indicated with sufficient clearness. The Court, however, upon an examination of the entry, rejected this contention and held that the mention of the plaintiff's trade name 'Fredericks,' which the defendant as an auctioneer had the plaintiff's authority to insert in his book (*Peirce v. Corf*, L. R. (1874) 9 Q. B. 210), sufficiently identified him. It is useful to refer to *Jones v. Joyner* (1900) 82 L. T. 768, which was very like the present case but was not referred to, where it was held that a memorandum in a book which does not contain the name of the seller was sufficiently connected with its leather cover upon which his name was stamped to allow the name to be treated as a part of the memorandum.

On these authorities judgment for damages for breach of contract was given in favour of C, the circumstances not being such as to justify the Court in ordering specific performance.

L. G.

CONTRACT—CHARTERPARTY—ARBITRATION TO BE CONDITION PRECEDENT TO AN ACTION—LIMITATION ACT (21 JAC. 1, c. 16).

Board of Trade v. Cayzer, Irvine & Co., Ltd. [1927] A. C. 610.
96 L. J. K. B. 872.

IN May, 1917, the Crown requisitioned the claimants' steamship under terms of a charterparty whereby:—

- (1) The Crown undertook liability for war risks only.
- (2) Both parties agreed to refer any dispute to an arbitrator, and that 'such arbitration shall be a condition precedent to the commencement of any action at law.'

In July, 1917, the steamship was lost as the result of a collision, but the claimants, awaiting decisions in similar cases on the question of 'warlike operations,' did not proceed to arbitration until December, 1923. It was contended on behalf of the Crown that as proceedings were not taken within six years after the collision the claimant's right of action was barred by the Statute of Limitations (21 Jac. 1, c. 16). On this point the arbitrator stated a case for the opinion of the Court, but held that the steamship was lost as a result of warlike operations.

The question to be decided was whether this contention on behalf of the Crown was sound and a complete cause of action arose at the time of the collision, or whether the effect of condition 2 (*supra*) was to postpone its accrual until an award had been given by the arbitrator. Under the Statute of Limitations time starts to run against a claimant

when the right of action accrues, and in cases relating to contract this accrues when a breach of contract has occurred. Now in an action in tort, say for assault, the statute runs from the time when the assault has been committed; similarly, where a person claims land as a squatter, the statutory period commences on his entry into possession. The time of a breach of contract must, however, be ascertained in the ultimate resort by reference to the terms of the original contract. What the parties have, in effect, agreed to here is that: 'If your ship is lost through war, we (the Crown) will pay such a sum as an arbitrator shall determine.'

This was the view taken by the House of Lords, and the following passage appears in the Lord Chancellor's judgment: 'The effect of that condition [*i.e.* No. 2 *supra*] as interpreted in *Scott v. Avery*, 5 H. L. C. 811, and other cases, is that until the arbitrator has performed his duty . . . the claimant cannot even commence to enforce his claim at law; or (in other words) that until an award is made he has no complete cause of action. . . . Under the statute of James, which applies to this case, time runs from cause of action.'

On these grounds the House of Lords gave judgment in favour of the claimants.

A further point raised in this case, though not decided by it, is the question of the right of the Crown to plead the Statute of Limitations in order to bar by lapse of time the claims of a subject, the Crown not being expressly referred to by that statute. A statement occurs in *Chitty on Prerogatives of the Crown* (p. 382) that 'though the King may avail himself of the provisions of any Act of Parliament, he is not bound by such as do not expressly mention him.' It was contended in the present case that the passage quoted was based on the unsuccessful argument in the *Magdalen College Case* (1616) 11 Rep. 66, and that if the King is not expressly bound he may not take advantage of the statute. However, it is certain that the Crown is not bound by a statute unless directly or by necessary implication referred to therein, and a clear case on this point is that of *Att.-Gen. for New South Wales v. Curator of Intestate Estates* [1907] A. C. 519, P. C., in which it was held that the Crown was not bound by a (Colonial) Act protecting from creditors the proceeds of life insurance policies. As to the second part of the proposition, that as to whether the Crown may avail itself of any given statute (and this is the only part in any way relevant to the present case), the *dictum* of *Chitty* quoted above seems to have been borne out by a series of cases, notably by that of *Att.-Gen. v. Tomline* (1880) 15 Ch. D. 150, C. A., where the Crown acquired a freehold title under the Statute of Limitations, and that of *R. v. Cruise* (1852) 2 Ir. Ch. R. 65, which established that though the Crown is not bound by statute 12 & 13 Vict. c. 106 (as to judgment creditors), it may avail itself of the statute. In the present case, however, the point is not material to the decision, and as *Scrutton L.J.* pointed out in the Court of Appeal [1927] 1 K. B. at p. 295, the law still remains indefinite on the point. Since this case was decided *Romer J.* has held, in *Re Petition of Right of Mason and Others*, 44 T. L. R. 225, that the Crown might avail itself of the Limitation Act, 1623.

N. J. M.

CONTRACT—SALE OF GOODS—BREACH OF WARRANTY—SUB-SALES—
REMOTENESS OF DAMAGES.

Kasler and Cohen v. Slavouski. [1928] 1 K. B. 78. 96 L. J. K. B. 850.

THE question involved in this case was how far can legal costs be included as damages in a claim for breach of warranty. The facts relate to the history of a lady's fur collar. The plaintiffs bought dyed rabbit skins from the defendant for making into fur collars. They sold the collars to A, who in turn sold them to B, who sold them, now on ladies' coats, to C (a draper). C sold a coat to D (a customer), who wore it and contracted dermatitis from an injurious substance in the fur. The contracts were under section 14, sub-section 1 of the Sale of Goods Act, 1893, 'where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . there is an implied condition that the goods shall be reasonably fit for such purpose.' The furs sold by the defendant were not fit for the purpose for which they were required, and injury resulted, so that there was a cause of action for damages. A similar warranty applied to each sub-sale until the goods reached D, who was the first person to put the goods to the test which would reveal the defect. D sued C for damages for breach of warranty under the Sale of Goods Act, 1893, section 14, and C defended, giving notice to B of his intention to do so. C lost the action, and D recovered £67 damages and costs. C then claimed this from B with his own costs, and B paid, suing A in turn for his own losses. A did not defend, but paid the claim with costs, and sued the plaintiffs for this loss and costs. They gave notice to the defendant of their intention not to defend, and paid the claim. The plaintiffs now sought reimbursement of this sum (£699) from the defendant as damages for breach of warranty in the sale of the skins to them. Branson J. found the facts as stated, and held that the plaintiffs could recover all the losses reasonably due to the breach of warranty, including the costs incurred by the sub-purchasers.

The law on the point has been developed from the rule in *Hadley v. Baxendale* (1854) 9 Ex. 341, which illustrates the question of remoteness of damages both in contract and tort. There the working of the plaintiffs' mill was interrupted through the breaking of an iron shaft, and the defendants undertook to carry the broken shaft to a foundry for replacement in two days. They delayed seven days before delivery, and meanwhile the mill was standing idle, whereby much profit was lost. The plaintiffs sued for this loss, whereas the defendants only admitted a small liability for the actual delay in delivery. Upon a rule for a new trial it was argued that the claim was too remote in the absence of special contract—'*in iure non remota causa sed proxima spectatur.*' A rule was laid down for the guidance of the Court that 'where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (*i.e.* according to the usual course of things) or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the

contract as the probable result of the breach of it.' The loss of profit was neither a natural result of a contract for carriage of goods nor one contemplated by the defendant, who did not know the circumstances. The plaintiffs in the present case argued that their claim was not excluded by this rule, relying on two cases—*Hammond & Co. v. Bussey* (1887) 20 Q. B. D. 79, and *Agius v. Great Western Colliery Co.* [1899] 1 Q. B. 413. The former case was one of sale of coal by description for resale. The coal did not agree with the description, but this did not appear until it was used by the sub-vendee, who thereupon sued the plaintiff and recovered damages. The plaintiff claimed these with costs from the defendant, and it was held that the defence of the previous case being reasonable, the costs incurred were recoverable, as they might reasonably be supposed to have been contemplated by both parties as a probable result of a breach of the contract. *Agius v. Great Western Colliery Co.*, *supra*, was another coal case in which it was held that the success of the plaintiff in reducing the sub-vendee's claim was proof of the reasonableness of his defending the action. These cases extended the rule to an action by a first sub-vendor, for it is likely that, upon a breach of contract the sub-vendee will sue, that the sub-vendor will defend if there are reasonable grounds and if he loses the costs will be a reasonably contemplated result of the breach. But of course the vendor must know of the intention to resell if he is to contemplate this result.

Though firstly applied to costs incurred against a first sub-purchaser, the defendant in the present case argued that the further extension of the rule to include later sub-sales as in this case was excluded by *Borries v. Hutchinson* (1865) 18 C. B. (N.S.) 445, and *Walter Potts & Co. v. Brown, Macfarlane & Co.* [1923] (unreported). In the earlier case the defendant contracted to sell goods to the plaintiff, who contracted to resell them to A in Russia (defendant knowing of this contract). A in turn contracted to sell to B, and upon a breach of defendant's contract, A paid damages to B and recovered them against the plaintiff. The plaintiff sued the defendant (1) for his own loss on his contract with A, and (2) for the damages paid by A to B and refunded to A by him. The second claim was held too remote as being neither natural nor contemplated by the defendant. In *Walter Potts & Co. v. Brown, Macfarlane & Co.*, *supra*, Shearman J. refused to allow costs beyond the first sub-sale where there was non-delivery by defendants of iron which the plaintiffs had sold to A, and A to K.

In the present case it was reasonable to resell and come back upon the vendor for costs incurred as a result of breach of his warranty. It was held as early as 1816, in *Lewes v. Peek*, 7 Taunt. 158, that the buyer of a horse with a warranty might charge his vendor with the costs of an action by a sub-purchaser on a similar warranty given by him. If the rule holds for a first sub-sale, there is no logical reason why it should not continue to apply to all sub-sales reasonably contemplated in the original contract, and although it had been restricted in *Walter Potts & Co. v. Brown, Macfarlane & Co.*, *supra*, to the first two steps, Branson J. declined to follow that judgment. *Borries v. Hutchinson*, *supra*, is distinguished, as there was there no contemplation by the defendant of a second continental sub-sale which might be affected as the result of a breach of the original contract. Especially is this so when the same contract passes on the same goods under the same warranty, and in the present case such a series of contracts was contemplated as would carry the furs to the wearer, who would be the one to suffer by a breach of warranty anywhere along the line. It is

remarkable that no mention was made here of the famous case of *Re Polemis* [1921] 3 K. B. 560, a recent decision on negligence and remoteness of damage in tort, and which arose itself from a contract. There it was held that if an act is negligent all direct consequences of it, whether foreseeable or not, are included in the liability. No one attempted in the present case to apply this rule to a breach of warranty in a contract, and so make the defendant liable for all direct results of his breach. The test is still the rule in *Hadley v. Baxendale*, *supra*, whereby all the natural results, and all results presumed to be contemplated by the parties so as to be bound thereby, form a direct series of results of the original contract; and a breach of it will apply to all the damage done, even though unforeseen at the time. Moreover, costs which a party has to pay to his vendee are as much damages as the sum actually recovered for the injury.

Finally, the question of reasonableness is intimately connected with the liability. If a plaintiff has given a warranty on a sub-sale when he might have discovered the defect he cannot charge the costs of a breach of his own warranty on his vendor (*Wrightup v. Chamberlain* (1839) 7 Scott, 598), nor if he pays the claim when there is a good defence (*Kiddle v. Lovett* (1886) 16 Q. B. D. 605). In the present case C (the draper) could have settled D's claim for £50, but it would have been unreasonable to have done so, because an analyst's report was issued alleging that there was no deleterious matter in the fur. C naturally defended on this ground, and if, when he lost, the expense incurred was greater than the sum asked in settlement, his act was nevertheless reasonable. Further, in this and all the subsequent claims, notice was given to the defendant, but he took no steps to prevent the payment of claims, and could not now maintain that the costs claimed were unreasonably incurred. Judgment was given for the plaintiff for all the damages and costs in the original action and a reasonable sum for the expenses of each intervening party in passing on the claim.

H. B. R.

CRIMINAL LAW—EVIDENCE OF SIMILAR ACTS.

R. v. Chesshire. 20 Cr. App. R. 47.

IN this case the defendants, a 'bookmaker's financier' and two police constables, were charged under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), s. 1—the 'financier' for corruptly giving and the constables for corruptly accepting or obtaining a gift. The defence was a denial that the payment had ever been made. There was found on the 'financier' a paper containing various entries, such as 'sergeant, 5s.; 3 flattys, 7s. 6d.; extra flatty, 2s.; private flatty, 2s. 6d.' A majority of the five judges who reheard the appeal held that this paper was properly admitted in evidence against all the defendants.

This case raises the interesting and much debated question as to the admission of evidence of similar acts. The general rule is that such evidence is not admissible except to prove guilty knowledge and intent on the part of the prisoner, or to prove a system or course of conduct, or to rebut a defence of accident or mistake, or other innocent condition of the mind (*R. v. Geering*, 18 L. J. (N.S.) M. C. 215; *R. v. Cotton* (1873) 12 Cox C. C. 400). The rule is stated in Halsbury's Laws of England, vol. ix, p. 380, as: 'Evidence cannot be given for the prosecution to prove that the

defendant is of bad character or has a propensity to commit criminal acts of the same nature as the offence charged. But in cases where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. . . . Such evidence is admissible to show not that the defendant did the acts which form the basis of the charge, but that, . . . he did them intentionally and not accidentally, or inadvertently, or innocently, or that they formed a part of a system.'

In view of the fact that the defence was a denial of payment, it is difficult to see how such evidence could be admitted to prove the fact that the act was done. In a case where the defendants were charged with demanding money with menaces (*R. v. Boyle and Merchant* [1914] 3 K. B. 339 at p. 347), Lord Reading C.J. said: 'We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to shew generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible,' and evidence of a previous demand made by the defendant on another person was admitted to show the state of mind of the accused since the defendant admitted making the demand.

In *R. v. Armstrong* [1922] 2 K. B. 555, where Armstrong was charged with the murder of his wife, evidence of an attempt to poison another person was admitted to show that arsenic found on the person of Armstrong was to be used for an unlawful purpose.

In the case of *Makin v. Att.-Gen. for New South Wales* [1894] A. C. 57 the Privy Council held that where the prisoners were accused of the murder of an infant child, evidence that other dead infants had been found buried in the gardens of several houses occupied by the prisoners was admitted to show 'whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.' It would seem that the only ground on which such evidence can be introduced is not to rebut a remote defence that might be offered by the defendant, but to rebut the actual defence made by the accused. In the *Makin Case* the defence was that the infant was a victim of an accidental death.

However, it seems that all the cases cited can be distinguished from the case under review. In the *Makin* and *Armstrong* cases, we have deaths to be explained. Deaths are either accidental, intentional, or a result of illness. It is quite proper that evidence of similar acts done by the accused should be admitted to show which alternative caused the death. In the case of *Boyle and Merchant*, the evidence of similar acts was allowed to show the state of mind of the prisoners. But in the case under review, the defence is a denial of payment and it would appear that the only purpose of admitting the evidence of prior similar acts would be to prove the only point in dispute, *i.e.* whether the 'financier' made a payment to the other defendants or not.

CRIMINAL LIABILITY OF CORPORATIONS—CRIMINAL JUSTICE ACT, 1925.

R. v. Cory Bros. [1927] 1 K. B. 810. 96 L. J. K. B. 761.

THIS was an indictment of a corporation and three other persons on two charges: (a) manslaughter; (b) misdemeanour.

Professor Kenny has said (*Criminal Law* (12th ed.) p. 63), 'Corporations formerly lay quite outside the criminal law. This was a consequence of the technical rule that criminal Courts expected prisoners to stand at their bar and did not permit "appearance by attorney."' There was also a difficulty in punishing a corporation, for it 'is devoid not only of mind, but also of body' (Kenny op. cit.).

The first difficulty was avoided by removing the indictment by writ of *certiorari* into the civil side of the King's Bench, where a corporation could appear by attorney. The difficulty of punishment for graver offences was to some extent removed by the Offences against the Person Act, 1861, which permitted fines to be substituted for other penalties at the discretion of the Court. As to the theoretical difficulties, Professor Kenny writes: 'But under the commercial development which the last two generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy this immunity. The various theoretical difficulties have therefore been brushed aside; and it is now settled law that corporations may . . . be indicted by the corporate name. . . . The innovation was introduced at first by drawing a distinction between offences of non-feasance and those of misfeasance, on the ground that whilst in the case of a criminal misfeasance, the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of a non-feasance; for the omission would not be imputable to any individual agent but solely to the corporation itself. Hence, in 1840, an indictment for non-feasance in omitting to repair a highway, was allowed against a corporation in *R. v. Birmingham and Gloucester Ry. Co.*, 3 A. & E. (N.S.) 223. Soon afterwards, in the case of *R. v. Great North of England Ry. Co.*, 9 A. & E. (N.S.) 315, an indictment was similarly allowed even for a misfeasance' (*Criminal Law*, pp. 64-65). Liability was based on reasons of expediency rather than on a clear, logical principle, and it was not till the enormous increase of companies under the Companies Acts that the principal of the vicarious liability of a master for the acts of his servant was applied to them. Lord Bramwell was a bitter opponent of this view. In *Abrath v. North Eastern Ry. Co.* (1886) 11 App. Cas. 247, 251, he said: 'A corporation is incapable of malice or of motive. . . . If the directors . . . were maliciously to order a prosecution, no action would lie against the corporation, because the action on the part of the directors would be *ultra vires*; they would have no authority to do it.' Lord Bramwell's view was not followed, and the words of Lord Lindley in *Citizens Life Assurance Co. v. Brown* [1904] A. C. at p. 426 may now be accepted as authoritative. 'If it is once granted that corporations are for civil purposes to be regarded as persons, i.e. as principals acting by agents and servants, it is difficult to see why the ordinary rules of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases . . . and to apply them to one class of libels and to deny

their application to another class of libels on the ground that malice cannot be imputed to a body corporate, appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. . . . If Fitzpatrick published the libel . . . in the course of his employment, the company are liable for it on ordinary principles of agency.'

The civil liability of corporations is therefore complete: their criminal liability is more confined. 'Wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation can be indicted, whether the statute refers in terms to corporations or not. This is so whether the breach of duty is a non-feasance or a misfeasance' (Halsbury, Laws of England, vol. 8, p. 391). But an implied exception is inferred 'in the case of treason, felony, or misdemeanours involving personal violence' (Archbold, Criminal Pleading (27th ed.), p. 10).

In *R. v. Cory Bros.* [1927] 1 K. B. 810, counsel for the Crown argued that section 33 of the Criminal Justice Act, 1925, impliedly made a corporation liable for felony. The section in question removed the necessity for the procedure by *certiorari* above mentioned, by allowing the bill of indictment to be presented to the grand jury. Finlay J. held that section 33 merely provided machinery for carrying out the purpose of the law whereby already a corporation could be charged with certain offences. 'If it is conceded that the substantive law is not altered by the Act of 1925, then we have simply to ascertain from the authorities what the law is. It is always a tempting argument to say that the common law ought to keep pace with modern developments and therefore it ought to be decided that these authorities are antiquated, and that in 1927 they do not apply. It is enough for me to say that . . . in my opinion I am bound by authorities which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony, or for a misdemeanour of the nature set out in the second count of this indictment' (pp. 817-818).

Among the authorities his Lordship mentioned were the remarks of Lord Denman in *R. v. Great North of England Ry. Co.*, 9 A. & E. (N.S.) 315. Lord Denman said: 'Some *dicta* occur in old cases; "a corporation cannot be guilty of treason or of felony." It might be added, "of perjury or of offences against the person."' These words are often taken in an absolute sense that perhaps is not quite justified. The criminal liability of corporations for the acts of their agents and servants could easily be extended to treason and felony if the Legislature so enacted. There is no difficulty here in principle. The desirability or necessity for such an extension is quite another matter.

A. F. B. C.

CRIMINAL LAW—MONOPOLIES—RESTRAINT OF TRADE—PUBLIC INTEREST.

Crown Milling Co. v. The King. [1927] A. C 394. 96 L. J. P. C. 68.

DURING the period of industrial disorganization that followed the war, the flour millers of New Zealand determined to organize themselves. A central distributing company was set up, and agreements with practically

all the millers in New Zealand were entered into on the basis of a '*del credere*' agency; amount of production, price, and the whole organization of marketing were placed in the hands of the distributing company, which was also to have an exclusive agency.

Proceedings were started by the Crown under sections 3 and 5 of the Commercial Trusts Act of New Zealand, 1910. Under section 2 of the Act a commercial trust is defined as 'any association or combination of persons having as an object: . . . (a) (i) controlling, determining, or influencing the supply or demand or price of goods in New Zealand or elsewhere; or (ii) of creating or maintaining in New Zealand . . . or elsewhere a monopoly whether complete or partial in the supply or demand of any goods; or (b) acting in New Zealand or elsewhere with any such object as aforesaid.' The third section made it an offence to give or offer in respect of any goods mentioned in the schedule (of which flour was one), any valuable consideration for entering into certain defined relations with a trust. The fifth section made criminal any conspiracy to monopolize or control the demand or supply in New Zealand of any goods so as to be contrary to the public interest.

The prosecution was based upon section 5; the Act did not attempt to define what the 'public interest' was. The trial judge dismissed the charge, but the Appeal Court after a hearing of seventy days reversed his decision by three to two. Stout, C.J. said: 'It is surely not necessary to show that the monopoly and control of food and its price are contrary to the public interest, . . . 'First, the Distributors' Co. had the power of fixing the price; second, it had the power of fixing the amount of production, and where the production was to take place at different parts of the Dominion, and it had the power of declaring that flour produced in New Zealand must be exported. It was therefore a contract of such a nature as to be contrary to the public interest.' Reed J. said: 'As for eighty years, with open and unrestricted competition, flour millers were able to carry on without the suggested dire results following, it would require the most cogent evidence that circumstances had so changed that at the present day it would be ruinous to private parties engaged in the industry if a return to such unrestricted competition were made, before the Court should assist in imposing upon the public such an extremely detrimental monopoly.'

The Crown Milling Company appealed, and the Judicial Committee advised the Crown that no evidence of an 'extremely detrimental monopoly' had been produced, and that the appeal must therefore succeed. 'It is apparent,' said Viscount Finlay, speaking for the Court, 'that the effect of the Act is not to treat every monopoly or control as necessarily contrary to the public interest. No offence is committed against the Act unless the maintenance or control is of such a nature as to be contrary to the public interest. . . . It is left to the Courts to ascertain in each case whether the nature of the monopoly or control is contrary to the public interest as a matter of fact, or as a matter of law under some provision of the law, whether common law or statute. . . . It is clear that the Legislature had in view that there might be cases of monopoly or control which would not be contrary to the public interest, and that it is so contrary must be established in each particular case of prosecution. . . .' It is noteworthy that his Lordship's statement of the facts occupies the major part of the report, while his ruling is only a few lines in length; as he said, 'The present case is really one of fact and cannot be decided merely as a question of law.' This is in complete accordance with the words of Lord Haldane in the *North Western Salt Co. v. Electrolytic Alkali Co.* [1914] A. C. 461: 'It

must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view.'

It is interesting to compare the circumstances existing in New Zealand with those in the U.S.A. and in this country. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade unlawful, and every monopoly or attempt to monopolize a statutory misdemeanour irrespective of sinister intention on the part of the accused, and irrespective of any detriment to the public (Lord Parker, in *Att.-Gen. of Australia v. Adelaide Steamship Co.* [1913] A. C. at p. 801). But it has been held that 'Congress must have meant a reasonable interpretation or else there would scarcely be an agreement or contract among business men that could not be said to have directly or indirectly some bearing on inter-state commerce and possibly to restrain it' (White C.J., in *Standard Oil Co. v. U.S.* [1910] 221 U. S. 1. 'The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express decisions of the Act. The enforceability of the contract becomes in this way the test of its legality' (Lord Parker, *supra*).

In England, as Lord Parker says ([1913] A. C. 797), 'no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract to do something unlawful, or something lawful by unlawful means.'

A. F. B. C.

INTERNATIONAL LAW—NATIONAL WATERS—TERRITORIAL WATERS—
FAUCES TERRAE.

The Fagernes. [1926] P. 185. [1927] P. 311. 96 L. J. P. 183.

ON March 17, 1926, a collision occurred in the Bristol Channel at a point which was $10\frac{1}{2}$ or $12\frac{1}{2}$ miles from the English coast, and $9\frac{1}{2}$ or $7\frac{1}{2}$ miles from the Welsh coast, according to the conflicting evidence of the respective parties. In any case it was at a place where the Bristol Channel is about twenty miles wide. Of the ships in collision, one was the steamer *Cornish Coast*, owned by the plaintiff, while the other, which went to the bottom, was the *Fagernes*, owned by an Italian company whose head offices are at Genoa. The action was for damage by collision and was brought *in personam* against the owners of the Italian ship. An Order was obtained in Chambers giving leave to serve notice of the writ beyond the jurisdiction of the Court, this Order, of course, being essential to the plaintiff's desire to obtain a hearing of his claim in an English Court. The defendants thereupon moved to set aside this Order upon the grounds (a) that the collision occurred outside British territorial waters and that the Court had no jurisdiction to try the case; or (b) that if there was jurisdiction, the granting of leave to serve notice outside the jurisdiction was a matter for the discretion of the Court and that the discretion should be exercised in the defendants' favour.

Hill J. pointed out that the Bristol Channel is, throughout its length,

bounded on both sides by land which is part of the territory of the King, and, chiefly on the authority of *R. v. Cunningham* (1859) Bell's C. C. 72, decided that the place where the collision occurred was within the body of the county either of Devon or Glamorgan. He then gave ample reasons for his refusal to exercise the discretion of the Court in favour of the defendants.

When the appeal from this decision was brought, their Lordships thought that questions were involved upon which the Crown might wish to be represented, and accordingly the case was adjourned for the attendance of the Attorney-General, if he so desired. The Attorney-General appeared and argued the case. He then informed the Court that if the Court desired a pronouncement as to whether or not the Home Office regarded the spot in question as being within His Majesty's territory, he was able to give such information. Upon being asked by the Court, the Attorney-General stated that he was instructed by the Secretary of State for Home Affairs that the spot where the collision was alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends.

It was held by Atkin and Lawrence L.J.J. that this statement was binding on the Court, while Bankes L.J. was of the opinion that the Court was not so bound, but thought that, having regard to the absence of authority and the general trend of modern jurists to limit the width of the *fauces terrae* within which there is territorial sovereignty, the Court should be guided by the information so given. Neither in *R. v. Cunningham* (1859) Bell's C. C. 72, nor in *R. v. Keyn* (1876) L. R. 2 Exch. D. 63, nor indeed in *The Direct U. S. Cable Co., Ltd. v. The Anglo-American Telegraph Co., Ltd.* (1877) L. R. 2 App. Cas. 394, nor in *Mortensen v. Peters* (1906) 14 Sc. L. T. 227; 8 F. (J.) 93 was such a procedure adopted, nor was the possibility of such a reference even mentioned in the arguments before the Courts. In an American case, however, *The Alleganean* (1885) Scott's *Cases on International Law*, 143, reference was made to the case of the *Grange* and *L'Embascade* (1793) where the opinion of the Attorney-General of the United States of America was asked as to whether Delaware Bay was territorial. Acting on the affirmative answer of the Attorney-General, the Secretary of State allowed the release of the ship.

In the last-mentioned case (*ibid.* at p. 146) it was said by the Court of Commissioners of Alabama Claims that 'Great Britain has immemorially and exclusively claimed and exercised property and jurisdiction over King's Chambers,' and this was as late as 1885. In *The Fagernes* there is the *obiter dictum* of Atkin L.J. (at pp. 325-6) and of Lawrence L.J. (at p. 328) to the effect that the claim to King's Chambers has never been abandoned. But it is clear that as to certain parts of the Bristol Channel and of the Moray Firth the claim to King's Chambers has been abandoned (*The Fagernes: Mortensen v. Peters*). Further than this, however, it is not possible to go. King's Chambers claims may or may not have been abandoned, but at least in regard to certain parts of those arms of the sea known as the Bristol Channel and the Moray Firth the claim avowedly has been withdrawn.

In the British Year Book of International Law for 1922-23, pp. 42-54, Sir Cecil Hurst drew attention to the importance of the distinction between what he calls 'national waters' and territorial waters. The distinction is no new one in international law, and it has been made and upheld in the municipal Courts of this country. The distinction, however, has not been

by any means clearly appreciated. *The Fagernes* case throws into relief the difference between the effects of the decisions and of the nature of the facts in *R. v. Cunningham* and *R. v. Keyn*. If the place where the collision occurred in *R. v. Keyn* had been 'within the body of the county' no difficulty would have arisen, but this case was purely a case of territorial waters. On the other hand, *R. v. Cunningham* was a case of national waters, or what Pitt Cobbett (see 4th ed., vol. 1, p. 142) calls 'territorial waters proper.' But the essential character of waters which are national is that they form part of the realm—they are as much a part of the kingdom as the adjoining county of which they are deemed a portion. There can be no question as to the character of the water which at high tide covers the shore above the low water mark, and in parts of the United Kingdom this is no inconsiderable stretch. The point from which territorial waters are measured is low water mark, and clearly at high tide the expanse of water above low water mark cannot be territorial waters; it is part of the realm—national waters. So also are those stretches of water which lie 'inter fauces terrae,' 'within the body of the county,' or in national bays. Since *R. v. Cunningham* and prior to *The Fagernes*, it has been generally thought that the waters of the Bristol Channel were national waters. (It is of interest to note that in all the editions of Hall's International Law up to and including the seventh, the following note was inserted as to *R. v. Cunningham*: 'It was apparently decided by the Queen's Bench in *R. v. Cunningham* that the whole of the Bristol Channel between Somerset and Glamorgan is British territory. Possibly, however, the Court intended only to refer to that portion of the Channel which lies within Steephelm and Flatholm.' In the British Year Book of International Law, 1922-23 at p. 45, however, Sir Cecil Hurst refers to this note and says that the last sentence is a mistake. In the eighth edition of Hall this part of the note is omitted.) Now it can only be said (a) that the waters lying above Lavernock Point are national waters (see *R. v. Cunningham*); and (b) that the waters between Lavernock Point and a line drawn from Bull Point to Port Eynon Head probably are not national waters (see *The Fagernes*); and (c) that the waters to seaward of that line certainly are not national waters.

Where the line actually is to be drawn from which territorial waters commence is not settled, but if *R. v. Cunningham* has not been overruled by the decision in *The Fagernes*, then probably the three-mile stretch begins at a line drawn across the Channel at the point below the $7\frac{1}{2}$ -mile line drawn from Lavernock Point to Brean Downs where the distance across the Channel first becomes 10 miles. The fixing of the distance at 10 miles is purely arbitrary and cannot be said to be universally agreed upon, but it is the distance agreed upon in the North Atlantic Fisheries Arbitration. It also is the standard adopted by Sir Cecil Hurst in his very able article in the British Year Book of International Law, 1922-23 (see p. 42 and particularly at p. 45). If, however, it could be said that *The Fagernes* case does overrule the decision in *R. v. Cunningham*, the case would be little different, for this view of the effect of the two decisions can only be based on the disagreement in the former case with the *obiter dicta* in the latter referring to 'the whole of the inland sea between the counties of Somerset and Glamorganshire.' With all due deference to the opinions of the learned author of the note in his article in the Year Book already referred to, and to the learned editor of the eighth edition of Hall, it is submitted that the true view is to regard each case as purporting to decide the point only as to the particular facts of each case, and, though *R. v. Cunningham* was

much quoted in *The Direct U. S. Cable Co., Ltd. v. The Anglo-American Telegraph Co., Ltd.* case, it was not necessary to the decision therein. To regard either *R. v. Cunningham* or *The Fagernes* as purporting to deal with the larger issue is, it is submitted, mistaken and unnecessary.

All that need be added to this note is to point out that, according to international law, over territorial waters there is a right of innocent passage which in peace time pertains to all foreign vessels whether public or private (though Hall doubts the full extent of this statement), but over national waters there is no such right. There is, however, a customary right of refuge in case of distress, a right which is based on humanitarian principles, but a foreign ship has no more right to enter the national waters of a state than it has to enter its ports, except in so far as, by reciprocal agreement, this has been modified in particular cases under the Barcelona Conventions of 1921. As to the Constitutional point raised by *The Fagernes* case, reference should be made to the note on the case in the *Law Quarterly Review* for January, 1928, at page 4.

J. O. J. M.

REAL PROPERTY—DEED CREATING TWO SETTLEMENTS—ARE TRUSTEES
OF ONE TRUSTEES OF BOTH?

Re Ogle's Settled Estates. [1927] 1 Ch. 229. 96 L. J. Ch. 113.

UNDER a deed of settlement and subsequent deeds, an estate consisting of Blackacre and Whiteacre stands charged with a jointure rentcharge in favour of a woman for life and subject thereto stands limited to A in fee simple. At some time before January 1, 1926, A sells Blackacre to B subject to the rentcharge but with an indemnity against it.

Before January 1, 1926, Blackacre and Whiteacre are not settled land,* but after January 1, 1926, they both become settled land by virtue of section 1, sub-section 1 (v) of the Settled Land Act, 1925, which enacts that land charged under any instruments with the payment of a rentcharge for the life of any person is settled land. Moreover, the instruments under which they are so charged are the same for both Blackacre and Whiteacre.

In 1926, A applies to the Court to appoint trustees of the settlement which exists in Whiteacre. The object of this case is to determine whether such trustees, if appointed, would also be trustees in respect of Blackacre. If they would, the present owner of Blackacre would have to be served with a notice of the application and it would be expensive for A to serve him.

The difficulty is due to the somewhat loose use of the word 'settlement' in the Settled Land Act, 1925, and to the inexact wording of section 31, sub-section 1 of that Act, which enacts that:—

'Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation.'

It might appear from this section that trustees who are appointed to the settlement created in Whiteacre by a certain set of instruments would automatically become trustees of any other settlement created by that set

and so would become trustees of the settlement in Blackacre. This interpretation only suggests itself because the wording of the section is inexact.

The word 'settlement' is used in the Act to mean, in some places, the state of affairs that exists in certain land, in other places the instruments which create that state of affairs. The phrase 'trustees of a settlement' means trustees of the settlement created by an instrument and not trustees of the instrument that creates the settlement. Trustees are only trustees of the instrument in so far as they have the right to hold the instrument. Therefore in section 31 the phrase 'trustees . . . of an instrument which is a settlement' must mean trustees of the settlement which is created by an instrument. This question then arises: if one instrument creates two distinct settlements, as, for example, if the instrument settles two estates in different ways, does a person who is appointed trustee of one settlement become trustee of the other? Romer J. held in the present case that he does not. The intention of section 31 is that, if land is settled by one set of instruments and is later resettled by other instruments so that a compound settlement exists in the land, the trustees of the original settlement shall be trustees of the compound settlement. But it is not intended that if two distinct settlements are created by the same instrument the trustees of the one shall *ipso facto* be trustees of the other.

In the present case there was no settlement subsisting on December 31, 1925.* On January 1, 1926, Blackacre and Whiteacre both became settled land, being charged under the same instruments with a rentcharge for life. There is not, however, a single settlement of the aggregate estate comprising Blackacre and Whiteacre, but one settlement of Blackacre and another of Whiteacre. The Court can therefore appoint trustees of the settlement of Whiteacre who will not be trustees of the settlement of Blackacre.

J. W. B.

* NOTE.—The question, whether land held in fee simple subject to a prior rentcharge for life created by a settlement, is or is not settled land under the Settled Land Act of 1882, was decided in *Re Earl of Carnarvon's Settled Estates* [1927] 1 Ch. 138. It was held not to be settled land.

REAL PROPERTY—TRUST FOR SALE.

Re Parker's Settled Estates. [1928] 1 Ch. 247.

IN 1925 Blackacre was the subject of a compound settlement. The earlier instruments had created a jointure rentcharge in favour of the plaintiff's wife and a term of 1,000 years commencing from the plaintiff's death in favour of A and B the trustees of the settlement upon trust to raise portions for the younger children of the plaintiff. Subject to these charges it was limited to other trustees C and D upon trust to sell, during the plaintiff's life at his request, and after his death at the discretion of the trustees. The proceeds of the sale were to be held by C and D upon trust to pay the income, subject to certain annuities, to the plaintiff for life and after his death upon further trusts. This action is brought by the plaintiff to decide what effect the recent property legislation has in relation

to Blackacre and, in particular, whether or not after January 1, 1926, Blackacre remained settled land.

Before 1926 Blackacre was settled land; the legal estate in fee simple was vested in the trustees C and D upon trust to sell, but this estate was subject to the rentcharge and the portions term, both of which were legal interests; the plaintiff had therefore the powers of the tenant for life under the Settled Land Act, 1882.

Under the 1925 Acts the rentcharge, being for life, can subsist only as an equitable interest, but the portions term, although commencing in the future, can still subsist as a legal interest (Law of Property Act, s. 205 (xxvii) and s. 1, sub-s. 1.) If Blackacre is found to be settled land, the portions term, too, will be transformed into an equitable interest by section 1, sub-section 6 of paragraph 1 of the Second Schedule to the Settled Land Act, 1925, which enacts that, where a settlement existing before the Act becomes a settlement under the Act, all interests held under the settlement shall, from the date of the vesting deed, take effect only in equity. The question whether Blackacre remains settled land is governed by section 1 of the Settled Land Act, 1925, as amended by the Law of Property (Amendment) Act of 1926. Under sub-section 1, clause (v) of this section Blackacre, being charged with a rentcharge for life and with portions, will be settled land unless it is removed from the operation of the section by sub-section 7, which enacts that:—

‘ This section does not apply to land held upon trust for sale.’

It was this sub-section that the Court was in this case called on to interpret.

A trust for sale is defined by the Act as meaning, unless the context otherwise requires, ‘an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person’ (Law of Property Act, s. 205 (xxix), and Settled Land Act, s. 117 (xxx)). It was decided by Tomlin J. in *Re Leigh's Settled Estates* [1926] Ch. 852 (see the note on the case in the Cambridge Law Journal, 1927 at p. 110) that if the estate of the trustees is subject to a prior equitable interest there is no ‘binding trust for sale.’ On this interpretation ‘binding’ means ‘binding the whole unencumbered fee simple’; when there are any prior interests that cannot be overreached by the sale there can be no trust for sale within the definition.

This interpretation was strongly criticized by Romer J. in the present case on three main grounds. If it were adopted, the many general provisions regarding trusts for sale in the new Acts would be restricted in their application to a very small class of trusts for sale. Further, the Court of Appeal have held in *Re Ryder and Steadman's Contract* [1927] 2 Ch. 62 that the Acts create a trust for sale subject to a prior equitable interest in a particular case, namely, where land is held before the Acts by tenants in common in fee simple subject to an equitable interest. Lastly there are places where the wording of the Acts is inconsistent with the interpretation of Tomlin J., or at least suggests a wider one. In section 2, sub-section 2 of the Law of Property Act (as amended by the Act of 1926) occur the words ‘any equitable interest or power having priority to the trust for sale’; in section 35, sub-section 3 of the Trustee Act, the words ‘trust for sale relating to a legal estate’ suggest that a trust for sale may exist relating to equitable interests in land. There are several further instances. Romer J. did not profess to give a definite interpretation of the word ‘binding,’ but suggested either that it is intended to exclude trusts for sale in which the

grantor reserves the power to revoke the trust (cf. *Re Goodall's Settlement* [1909] 1 Ch. 440), or that it has the meaning usually expressed by the word 'imperative.'

On Romer J.'s interpretation both legal and equitable interests in land can be the subject-matter of a trust for sale. But clearly it is not every such trust for sale that will take the land out of the operation of section 1 of the Settled Land Act. A settlement of land carves the full ownership of the land into a number of estates and interests, legal and equitable, any of which may be the subject-matter of a trust for sale. If the trust for sale operates on a small part only of the whole beneficial interest in the land, the settlement will continue and the trust for sale will subsist under it. If it operates on the whole beneficial interest in the land the settlement will cease to be, in virtue of sub-section 7 of section 1 of the Settled Land Act. Just how large an interest in the land must be the subject-matter of a trust for sale for sub-section 7 to take effect is not yet decided. In the present case Romer J. ruled that the subject-matter of the trust for sale must be at least the whole legal estate in the land.

Now the trust for sale relating to Blackacre does not operate on the whole legal interest in the land. It was created subject to a legal term of 1,000 years which had priority to it. So under the rule stated above sub-section 7 has no effect.

The conclusion therefore is that Blackacre remains settled land subject to a compound settlement of which the plaintiff is tenant for life, and that a vesting deed must be made in his favour. As from the date of the vesting deed the term of 1,000 years will take effect only in equity, by reason of section 1, sub-section 6 of paragraph 1 of the Second Schedule to the Settled Land Act, 1925.

It is to be observed that Romer J.'s conclusion reduces his criticism of Tomlin J.'s judgment to the position of a *dictum*. But it is submitted that the force of his reasoning is so great that his view will be followed.

J. W. B.

TORT--NEGLIGENCE--CHILD--TRAP--INVITATION--DUTY TO TAKE CARE--
PERMISSION TO RESORT.

Halstead v. J. Bargh & Co. (1928) Law Journal C. C. R. 2.

THIS case introduces no new principle and adds nothing to the law of tort, but it does enable us to take a general survey of the duty that is owed to children with respect to attractive dangers.

The facts are as follows. The plaintiff was a boy of thirteen, and the defendants were the occupiers of a shed close to where plaintiff lived with his parents. In this shed there were two machines worked by mechanical power for the purpose of grinding and crushing cake for cattle. Now the machines in the defendants' barn seem to have been a great attraction to the plaintiff and two other children; they were in the habit of playing there, and endeavouring to feed the machines, but in doing so they were a nuisance to the defendants' foreman who was in charge of the shed, and he had frequently driven the children away; and it was found that the children knew that they had no right to touch either of the machines, and that it might be very dangerous for them to do so. The plaintiff

unsuccessfully claimed damages for personal injuries sustained by him in consequence of an accident which happened to him while feeding a cattle-cake grinding machine of the defendants.

The general principle is stated by Lord Denman C.J. in *Lynch v. Nurdin* (1841) 1 Q. B. 29, who said it was negligent to have anything dangerous where 'it is extremely probable that some other person will unjustifiably set it in motion to the injury of a third.' In that case it was a child who was injured. The defendant negligently left his horse and cart unattended in the street, and the plaintiff, aged seven, climbed into it, while another boy made the horse move on, and so caused the plaintiff to fall out and suffer injuries. It was held that the defendant was liable.

Lord Macnaghten, in *Cooke v. Midland Great Western Ry. Co. of Ireland* [1909] A. C. at p. 234, referring to the principle stated by Lord Denman in *Lynch v. Nurdin*, thought that 'if that proposition be sound surely the character of the place, though of course an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground.'

This confirms *Clark v. Chambers* (1878) L. R. 3 Q. B. D. 333, in which strong disapprobation was expressed of the decision in *Mangan v. Atterton* (1866) L. R. 1 Ex. 239. In the latter case a boy aged four placed his fingers in a machine exposed in a public place for sale and without superintendence, as a result of which he crushed them. Bramwell B. held defendant not liable on the ground that the injury was caused by the plaintiff, who was a trespasser. This must be taken to have been in principle wrongly decided.

Lord Atkinson, in the *Cooke Case*, thought that if vehicles or machines are left by their owners or by the agents of owners in any place which children are rightly entitled to frequent unattended or unguarded, and in such a state as to be calculated to attract or allure these boys and to be dangerous if intermeddled with, then the owner of these machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former, even though the injured person be a trespasser on the vehicle or machine at the moment the accident occurred.

Where, however, an occupier habitually and knowingly acquiesces in the trespasses of children, these children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly. In the *Cooke Case* the plaintiff was a child between four and five years of age, who was injured while playing with his companions on a turntable on the defendant railway company's premises. The turntable was kept unlocked, and was close to a public road. The company's servants knew that children were in the habit of entering on the premises from the road for the purpose of playing with the turntable, and no precautions were taken by the company, either to exclude the children or to lock the turntable so as to prevent it from being an instrument of mischief. It was held by the House of Lords that there was evidence for a jury of actionable negligence on the part of the railway company. The principle of these decisions applies to any place to which children had a legal right to go, even though that right may be only the restricted right of a bare licensee. 'I therefore think,' says Lord Atkinson in the *Cooke*

Case (at p. 238), 'that if the owner of any premises on which dangerous and alluring machines are placed gives leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, to enter upon the premises, he will be quite as responsible for any injury one of the boys or children may sustain as if he had deposited the same machine in the public street.'

Cases where no liability is held to exist may be well illustrated by *Jenkins v. Great Western Ry. Co.* [1912] 1 K. B. 525, where the plaintiff was a child two-and-a-half years old, who trespassed on the defendant company's railway line by getting through the fence which separated it from the highway, and was then run down and injured by a train. On the railway premises and immediately adjoining the fence was a pile of sleepers, and children were in the habit, with the knowledge and tacit acquiescence of the company, of entering upon the railway premises, and playing on this pile of sleepers. The point to observe is that the tacit permission to enter the premises was confined to the locality of these sleepers, there being no permission to stray upon the railway line itself.

It may be laid down as a rule that the duty the owner of premises owes to persons to whom he gives permission to enter upon them must be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of these persons. That rule is peculiarly applicable to such a case as *Glasgow Corporation v. Taylor* [1922] 1 A. C. 44, where a child who was lawfully in a public park saw some attractive-looking berries close to the children's playground; it happened that they were poisonous and the child died. The House of Lords held that the child's parent had a right of action.

Lord Atkinson thought that there was no difference between the case of *Lynch v. Nurdin* and *Glasgow Corporation v. Taylor*. In both cases the child had a right to be where he was, and in one the object of temptation was a cart-horse left unattended, in the other a shrub bearing berries attractive to a child but poisonous. In both cases the owners were aware, or ought to have been aware, of the nature and strength of the temptation and the dangerous, possibly deadly, result of yielding to it.

The case of *Latham v. Johnson* [1913] 1 K. B. 398 was on its facts quite different both from the *Cooke Case* and *Glasgow Corporation v. Taylor*. In *Latham's Case* a child two-and-a-half years old was injured while playing on a heap of stones, to which habitual access of children was allowed by the defendant. The jury found (1) that the children played upon the land with the knowledge and permission of the defendants; (2) that there was no invitation to go on the land unaccompanied; (3) that they ought to have known that there was a likelihood of the children being injured by the heap of stones; (4) that the defendants did not take reasonable care to prevent the children being injured. Upon these findings Scrutton J. held that the case came within *Cooke's Case*, but the Court of Appeal held that there being neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land, the defendants were not liable.

These cases clearly establish that there is liability where the injured child is an invitee or a licensee, provided the given object is a 'trap' or 'allurement.' It is a question of law whether a given object is a 'trap' or 'allurement' in the sense of being fascinating and fatal.

This naturally raises the question, Is there liability where the injured child is a trespasser? This point is dealt with in *Hardy v. Central London Ry. Co.* [1920] 3 K. B. 459. In this case a child while playing on the

moving staircases at a railway station caught its hand in the moving rubber band, and was seriously injured. There was evidence that children had frequently played there, but had always been warned to go away by the booking clerk when he had time to do so. Shearman J. gave judgment for the plaintiff on the ground that the plaintiff was where he was when he was injured with the licence of the company because they did not take the simple, easy and effective steps which would have prevented children coming into the property, and that the portion of the escalator in which the plaintiff's hand was caught was something so highly dangerous as to constitute a trap to children against which it was the duty of the railway company to protect them. The Court of Appeal reversed the judgment, Bankes L.J. saying: 'The warnings given by these persons were ineffective in this sense only, that they did not prevent the children from returning as soon as they thought those who had warned them away were occupied in their other duties. If this is the true view of the evidence, then the finding of the learned judge appears to lay a wider duty upon the occupier or owner of premises than the law has hitherto recognized.'

Bankes L.J. proceeded to point out that the warnings were entirely effective in bringing home to the minds and intelligences of the children concerned that they had no business to be where they were, or to play on the escalator, and that whenever they were seen they would be warned off. 'I can conceive,' he says (at p. 466), 'of warnings to children so ineffective, either from their nature or from absence of any attempt to enforce them, as to convey to the mind of a child the impression that no real objection was taken to what was being done.' But in this case they knew perfectly well 'that they had no right to be, and no business to be, where they were; in other words, that they were trespassers.'

In *Latham v. Johnson*, *supra*, Hamilton L.J. (as he then was) dealt with this point in these words: 'Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still if he goes on private ground without leave or right, however natural it may have been for him to do so.'

Scrutton L.J., in *Hardy's Case*, at p. 473, says: 'If the children were trespassers the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers.'

There is, however, one qualification of this general principle, namely, that if the object of attraction is found to constitute a nuisance, then the child injured, in spite of being a trespasser, can recover damages. This is illustrated by *Harrold v. Watney* [1898] 2 Q. B. 320, where a child had climbed on to a fence for the purpose of looking at other boys playing on the further side of the fence but not for the purpose of climbing over. The fence gave way and the child was injured. *Held*, that he was entitled to damages, as the fence was defective, and thereby a nuisance, and was the cause of injuries to the plaintiff.

Contributory negligence is no defence where the child is too young to be capable of it, but if the child is injured through the negligence of its guardian, then the child has no remedy, because defendant's negligence is not the decisive cause of the accident.

The County Court judge in the case of *Halstead v. Bargh*, which we

have had under review, found that the child was a trespasser, and that the machine which was the cause of the accident was not a nuisance, and that even if the machine was a trap in the double sense of being fascinating and fatal, which he doubted, the plaintiff would not even then have been able to succeed.

K. D. C. N.-D.

TORT—ANIMALS—SCIENTER.

Glanville v. Sutton [1928] 1 K. B. 571.

THE plaintiff's claim was for personal injuries caused by the bite of a horse, the property of the defendants.

The plaintiff was walking on the highway when the horse, which was also on the highway and was unmuzzled, stretched out its head and injured his face.

Evidence was given that on a previous occasion the horse had bitten another horse, and that since the injury to the plaintiff it had attempted to bite other horses.

The findings of the jury were as follows:—

- (1) Did the defendants know, or ought they to have known, that the horse was
 - (a) Dangerous to other horses?—Yes.
 - (b) Dangerous to mankind?—Yes.
- (2) Was the injury to the plaintiff caused by the dangerous nature of the horse?—Yes.
- (3) Were the defendants in all the circumstances negligent in leaving the horse unattended?—No.

On these findings they gave a verdict for the plaintiff.

The County Court judge came to the conclusion that, notwithstanding the finding of the jury, he must enter judgment for the defendants.

The plaintiff appealed to the King's Bench Division, where the judgment of the inferior Court was upheld.

This case adds one more to the large number of cases dealing with liability for damage done by animals that have come before the Courts in recent years.

Cases of liability in the owner of an animal for damage done by it may be divided under four heads:—

(1) Where cattle kept by the defendant on his premises escape on to the plaintiff's premises and there do damage. The term 'cattle' includes horses, oxen, sheep and swine, but not cats or dogs (*Buckle v. Holmes* [1926] 2 K. B. 125. Here the defendant is liable for all consequences of the trespass, even though the animal was not known to him to be of a vicious nature, and though no negligence was shown in the defendant, provided the damages were not too remote, for the trespass itself is the cause of action (*Ellis v. Loftus Iron Co.* (1874) L. R. 10 C. P. 10; *Theyer v. Purnell* [1918] 2 K. B. 333); but even then for a horse not known to be vicious to kick a man has been held to be too remote (*Bradley v. Wallaces, Ltd.* [1913] 3 K. B. 639).

(2) Where the damage arises from negligence or, indeed, any other tort, on the part of the defendant or his servant acting within the scope of his employment, e.g. driving the animal along the highway in a

negligent manner, as in the leading case of *Davies v. Mann* (1842) 10 M. & W. 546.

(3) Where the animal doing damage is *ferae naturae*. Here the keeper of the animal is bound by the rule of strict liability evolved by analogical application of the rule in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, known as the rule in *May v. Burdett* (1846) 9 Q. B. 101, that he who keeps an animal of a nature dangerous to mankind is liable without proof of any negligence.

The present case does not fall under any of the three heads above, for as to (1), the horse was lawfully on the highway; as to (2), by the finding of the jury, there was no negligence; and as to (3), a horse is not *ferae naturae*: *Cox v. Burbidge* (1863) 13 C. B. (N.S.) 430; *Manton v. Brocklebank* [1923] 2 K. B. 212.

Therefore liability, if the plaintiff were to succeed, had to be established under the remaining head:—

(4) Where the keeper of an animal not *ferae naturae* knows that the individual animal has a propensity to do the kind of harm suffered by the plaintiff. Here the rule of strict liability attaches with respect to harm of the same kind as that to which the animal, to the knowledge of the defendant, has a propensity.

The case of *Glanville v. Sutton* was held by the Divisional Court to furnish a further illustration of the rule that the vicious propensity in the animal, not being *ferae naturae*, must be to do the same kind of harm as that sued for by the plaintiff, and that just because an animal is known to be dangerous in one particular way it is not taken out of its class into that of animals *ferae naturae*, with respect to other kinds of damage, however unexpected and unusual such damage may be.

In *Osborne v. Chocqueel* [1896] 2 Q. B. 109 it was held that in order to support an action for damages for the bite of a dog it was necessary to show that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff; it was not sufficient to show that it had to the defendant's knowledge attacked and bitten a goat.

There seems to be no reason why the law should not be the same in the case of a horse, and, in the absence of evidence that horses dangerous to other horses are also dangerous to mankind, the jury were not entitled to find such to be the fact.

R. H. K.

TORT—BAILMENT—NEGLIGENCE—CONTROL—LIABILITY OF HIRERS FOR
SERVANTS OF OWNER.

A. H. Bull & Company v. West African Shipping Agency and Lighterage Company. [1927] A. C. 686. 96 L. J. P. C. 127.

THIS was an appeal to the Judicial Committee of the Privy Council from a judgment of the Supreme Court of Nigeria. The question was one which had often arisen previously, as to who is master when a servant is transferred by one party to do work for another. The facts briefly were that both parties were shipowners, and the appellants let a lighter on hire to the respondents. Further, it was agreed that it should be manned by two native labourers in the employ of the appellants as lighter-boys. One night, in the absence of these lighter-boys, the lighter broke from its

moorings in a strong tide and was wrecked. The question was whether the respondents were negligent in not keeping the labourers on board, and the judge of first instance held that they were, but this decision was reversed by a Full Court. It remained for the Privy Council to apply the law of a master's liability to these facts.

The question of liability for a servant's torts has been fully developed in the English Courts by a series of cases beginning with *Laugher v. Pointer* (1826) 5 B. & C. 547, and *Quarman v. Burnett* (1840) 6 M. & W. 499, which establish the notion of control as the fundamental factor. In the present case this must be applied to two problems: (1) Were the lighter-boys so in the employment of the respondents as to create between them the relation of master and servant; and (2) if so, did that relation exist continuously and apply to acts done at night as well as during working hours?

(1) It is clear that here there was an ordinary bailment, and that it was agreed that the vessel bailed should be manned by the labourers. In judging the liability of the hirers for the servants' acts, the essential nature of the element of control can be seen by comparing the two cases of *Quarman v. Burnett*, *supra*, and *Jones v. Scullard* [1898] 2 Q. B. 565. In the former case the defendants owned a carriage, and hired horses from a jobmistress, who also supplied a coachman to drive them, and damage to the plaintiff resulted from the driver's negligence. It was held that the carriage owners had no control over the coachman in the way he drove and that he therefore remained the servant of the jobmistress. In the latter case the facts were similar, except that the defendant owned the horses as well as the carriage, and for that reason it was held that he could control the hired driver in his management of them, and therefore the coachman was his servant. In these cases the element of control may be only minutely distinguished, but it is nevertheless the vital factor. The cases of *Rourke v. White Moss Colliery Co.* (1877) 2 C. P. D. 205, and *Donovan v. Laing & Co. Construction Syndicate* [1893] 1 Q. B. 629, apply the same principle to industrial undertakings. In the latter case, for instance, defendants lent a crane to wharfingers with a man to work it. Whilst so employed this man caused injury to the plaintiff, who sued the defendants for their servant's tort. It was held that as the servant had been transferred for a certain purpose entirely into the control of the wharfingers he was *ad hoc* their servant, and the defendants were not liable. In *Rourke's Case*, *supra*, Cockburn C.J. said that 'when one person lends a servant to another for a particular employment, the servant for anything done in that employment must be dealt with as the servant of him to whom he is lent, although in general he is the servant of him who lent him.' A shipping case in point is *Murray v. Currie* (1870) L. R. 6 C. P. 24, where a stevedore who was engaged to load a ship employed for that purpose members of the ship's crew, and it was held that *ad hoc* they were his servants, not those of the ship-owners. On the other side of the line, following *Quarman v. Burnett*, *supra*, are *Jones v. Corporation of Liverpool* (1885) 14 Q. B. D. 890, and *Waldock v. Winfield* [1901] 2 K. B. 596. The Privy Council, in *Bain v. Central Vermont Ry. Co.* [1921] 2 A. C. 412, approved the expression of the Canadian judge of first instance who said, using two French terms, there might be a 'patron habituel' and a 'patron momentané,' but it is the latter who is master for the purposes of liability in tort. Following this principle, there could have been no question that the lighter-boys had passed into the service of the respondents.

(2) The difficult question here is whether the principle will apply at night as well as during the hours of actual lighterage. The law says that the tort of the servant must take place in the course of his employment, and this will include *inter alia* a negligent execution of his work. All the previously mentioned cases which have been decided on the point were concerning acts which took place during daily operations, and there was no question of their being outside the scope of the transferred employment. In *Donovan's Case*, *supra*, it was suggested that for some acts of the servant the defendants might still have been masters, for which they would be liable. Here, then, in whose interests did the labourers look after the lighter at night? Upon this the judge of first instance found on the evidence that they were required to stay on board all night to obey the orders of the ship's crew, and that their negligence in leaving caused the damage. The respondents had to look after the vessel at all times, and they had given that task to the labourers, for whose negligent execution of it they must be responsible. The Privy Council concurred with this view, and Lord Shaw said that 'the suggestion that the lighter-boys passed into the control of defendants during the active lighterage, but out of that control and back into the service of the plaintiffs when the ship was tied up for the night seems to have nothing to commend it.'

H. B. R.

TORT—DANGEROUS PREMISES—BARE LICENSEE—OBVIOUS DANGER IN ROAD
—NOT A HIGHWAY—RULES OF LIABILITY FOR DANGEROUS PREMISES.

Coleshill v. Manchester Corporation, 44 T. L. R. 258.
97 L. J. K. B. 229.

IN this case the defendants, a local authority, were making in connexion with a building estate a road which was not a public highway, and was still unlighted at night. People were in the habit of using the road as a short cut to a golf links, *via* a gap in the fence adjoining the road. Plaintiff so used the road in daylight, and failed to notice an open trench across the road. In returning after dark he fell into the trench and was injured.

In an action for damages at the Manchester Assizes, Acton J. gave a judgment in favour of the plaintiff, but this was reversed by the Court of Appeal.

As regards the duty which the owner or occupier of premises owes to persons coming on the premises, there is some degree of uncertainty. It is well recognized that there are increasing degrees of care necessary according to whether the person entering is a trespasser, a licensee, or an invitee. In the words of Hamilton L.J., in *Latham v. R. Johnson & Nephew, Ltd.* [1913] 1 K. B. 398, 410, '... the law has long recognized three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. ... The lowest duty is towards a trespasser. More care, though not much, is owed to a licensee; more, again, to an invitee.' An invitee is defined in *Fairman v. Perpetual Investment Building Society* [1923] A. C. 74 as 'a person invited to the premises by the owner or occupier for purposes of business or of material interest,' whereas a licensee has permission to enter the premises for his own purposes, in which the licensor has no material interest.

First, as regards trespassers, the duty of the occupier is well defined. There is no liability on his part except for wilful injury, and even this imports no responsibility if the injury results from a perfectly reasonable measure of self-defence (*e.g.* broken glass on a wall, or a watch-dog). The only exception to this rule is that the occupier must not create a source of danger so near a highway as to make it unsafe for persons using the highway (*Barnes v. Ward* (1850) 9 C. B. 392).

Secondly, as regards a licensee, the general rule, which has a large number of authorities to support it (the more important of which are *Latham v. R. Johnson & Nephew, Ltd.*, *Fairman's Case*, *Hayward v. Drury Lane Theatre* ([1917] 2 K. B. 899), and *Mersey Docks and Harbour Board v. Proctor* ([1923] A. C. 253), is that the licensee must take the premises as he finds them. This is subject to the exception that the licensor must give warning of concealed dangers. In *Fairman's Case* Lord Wrenbury says (at p. 96): 'The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it.' In *Mersey Docks and Harbour Board v. Proctor*, Lord Sumner says: 'The owner must not lay a trap for him or expose him to a danger not obvious or to be expected there under the circumstances. . . . The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen.'

Thus the standard of duty owed to a licensee seems to be tolerably clear. It is in the third case, that of an invitee, that we encounter more difficulty. The leading authority on the point is *Indermaur v. Dames* (1866) L. R. 1 C. P. 274; 2 C. P. 311, where Willes J., whose judgment was confirmed by the Court of Exchequer, stated the duty as follows: 'And with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know. . . .' These words do not make it clear whether the duty is to use care to make the premises reasonably safe, in which case knowledge of the danger on the part of the invitee does not necessarily prevent him from succeeding in an action; or whether the duty is sufficiently fulfilled by warning the invitee, in which case the invitee cannot recover for injuries received from a danger the existence of which was known to him. Later cases on the point are of little help. In *Norman v. Great Western Ry. Co.* [1915] 1 K. B. 584 the Court of Appeal, reversing the decision of the lower Court, took the wider view and held that the duty is to take care to make the premises reasonably safe, and that this view is not consistent with *Indermaur v. Dames*. In *Brackley v. Midland Ry. Co.* [1916] 85 L. J. K. B. 1596, on the other hand, it was held also by the Court of Appeal (Phillimore J. was one of the judges on both occasions) that the duty was not established if the plaintiff knew of the danger, which is an acceptance of the narrower view. The difficulty is that if this interpretation of *Indermaur v. Dames* is the correct one, then the duty is exactly the same as that owed to a bare licensee, as laid down by the House of Lords in *Fairman's Case*. Yet, as has already been pointed out, it is well recognized that a higher duty is owed to an invitee. In this case *Norman v. Great Western Ry. Co.* must be the better decision. The point was considered by

the House of Lords in *Mersey Docks v. Procter*, where the Lord Chancellor refers to 'the well-established principle that where a landowner invites or induces a person to go upon his land, not as a bare licensee, but for some purpose in which both have an interest, he must make reasonable provision for that person's safety.' But later on he says: 'He (the invitee) was entitled, subject to using reasonable care on his part, that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known or to be expected by him.' Although in the first sentence he seems to take the view adopted in *Norman v. Great Western Ry. Co.*, the second implies that knowledge on the part of the plaintiff will prevent his recovering. In that case the plaintiff was held to have suffered damage as a mere licensee, so that the duty owed to an invitee was left unsettled, and the difficulty still remains.

In the present case Acton J., who was referred to only two authorities (*Oldham v. Sheffield Corporation* (1927) 43 T. L. R. 222, where the plaintiff was misled by a line of lights into thinking that the highway was continuous and drove into a ravine, and *Murley Bros. v. Grove*, 46 J. P. 360, where the plaintiff knew of the danger), put certain questions to the jury, who found that (a) the plaintiff was permitted to enter the roadway; (b) was misled by the defendants into thinking that the roadway was an ordinary highway; and (c) that there was no negligence on the part of the plaintiff. The Court of Appeal held that the position of the plaintiff could be put no higher than that of a mere licensee, and that there was no evidence that the defendants had exposed the plaintiff to a danger which was not obvious or to be expected under the circumstances; the case should therefore have been withdrawn from the jury, and the action failed.

J. K. W.

TORT—LIBEL—PRIVILEGED OCCASION—COURT OF REFEREES—ADMINISTRATIVE DUTIES—UNEMPLOYMENT INSURANCE ACT, 1920, s. 11.

Collins v. Henry Whiteway & Company, Ltd. [1927] 2 K. B. 378.
96 L. J. K. B. 790.

THE plaintiff had been employed by the defendant company. She was dismissed, and applied to the officer appointed under the Unemployment Insurance Act for unemployment benefit. The Insurance Officer reported the matter to a Court of Referees. After the Court had given its decision, but before the officer had promulgated it, the defendants wrote a letter to the Divisional Controller of the Ministry of Labour saying that the plaintiff was not a fit and proper person to receive relief. The plaintiff claimed that the letter was libellous, and sued for damages, and she was awarded £150 by the jury. The defendants contended that the letter formed part of the proceedings of a tribunal acting in a manner similar to a Court of justice and that such communication was entitled to absolute privilege. The plaintiff submitted that the Court of Referees was an administrative and not a judicial body. For this reason, Horridge J. thought that the communication was not entitled to be regarded as absolutely privileged, and inasmuch as the jury had found malice, the plaintiff was entitled to receive £150.

Only one important point of law is raised by this case:—

Is a Court of Referees as constituted by the Unemployment Insurance Act of 1920 a judicial body?

If it is, communications made to it are absolutely privileged; otherwise they are not, and a person making defamatory statements to such a body is entitled to only the ordinary privilege which applies to statements made without malice on a privileged occasion. Halsbury's Laws of England (vol. ix, p. 9) states: 'The distinction appears to be not so much whether the particular tribunal is a court of justice, but whether it is a court of law. Many bodies are not courts, although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality, such as assessment committees, boards of guardians, the benchers of the Inns of Court when considering the conduct of one of their members, or the General Medical Council when considering questions affecting the position of a medical man. A meeting of a County Council for granting music and dancing licenses is not a court nor are Justices at a licensing meeting sitting as a court of summary jurisdiction. As a general principle all courts must be open to the public.' It will be noticed from the above list that lawyers and doctors do not meet on occasions of absolute privilege to examine the conduct of fellow members of their professions. The Army and Navy, however, with whom the above professions are usually classed, are entitled to this absolute privilege, a point which is well illustrated in *Dawkins v. Lord Rokeby* (1873) L. R. 8 Q. B. 255. The distinction arises because the statute constituting Courts Martial expressly states that communications to such a Court shall be absolutely privileged; also, members of the Army and Navy are servants of the Crown in a sense that members of other professions are not.

There is therefore no reason why the doctrine of absolute privilege should be extended to other Courts, which are not strictly Courts of law on the analogy of Courts Martial. Statements made to these other Courts are privileged, but the privilege is qualified; the defendant is at liberty to make to the tribunal any statement which he thinks it is his duty to make in the public good. 'A duty of imperfect obligation,' said Cotton L.J. in *Waller v. Loch* (1881) 7 Q. B. D. 619, 'attaches on everyone to do what is for the good of society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it when asked by persons who wished to know whether the applicants are deserving objects.' This privilege is only destroyed by express malice found by the jury (*Nevill v. Fine Arts Insurance Co.* [1897] A. C. 68). Naturally the privilege is destroyed if the criticism is made to the wrong person, as was shown in *Toogood v. Spyring* (1834) 1 Cr. M. & R. 181; 4 Tyr. 582, where it was held that a tenant's criticism of workmen repairing a farm was privileged only if made to the land agent. In *Collins v. Whiteway* it was admitted that the defendants wrote to the right person and at the right time, but as the jury found that there was malice in the letter, the malice displaced the privilege which was only qualified as the Court was not a Court in law, but a tribunal with administrative rather than judicial duties. This case therefore is a direct parallel to *Royal Aquarium Society v. Parkinson* [1892] 1 Q. B. 431, where the defendant, a city councillor, overcome by prejudice and anger at an alleged indecent and public exhibition of the plaintiff society, made false and malicious statements at a licensing meeting of the L. C. C. in order to prevent the latter

from granting a licence to the society. Here, too, there was an example of express malice on an occasion of qualified privilege. The case of *Proctor v. Webster* (1885) 16 Q. B. D. 112 at first seems an exception to the rule that statements made to a judicial body are absolutely privileged; for in this case it was held that an action for libel could be maintained for statements in a letter to the Privy Council, injurious to the plaintiff who was a public officer removable by the Privy Council, on proof of express malice. But here the Privy Council was not acting as a judicial committee, it was merely considering the conduct of one of its officers in the same way as the General Medical Council or the benchers of the Inns of Court might deal with one of their members.

What bodies are judicial and what administrative, what occasions are absolutely privileged and what partially, it is often hard to determine, but it is clear that *Collins v. Whiteway* must come under the latter category if meetings of boards of guardians are not to become opportunities for the private malice of self-appointed witnesses.

W. S. W.

TORT—NEGLIGENCE—SPECTATOR ON GOLF COURSE—INJURY TO SPECTATOR.

Cleghorn v. Oldham. (1927) 43 T. L. R. 465.

THE plaintiff, while she was carrying the defendant's golf clubs in a match between the latter and the former's brother, was struck by a golf club when the defendant was demonstrating a stroke to her opponent after he had made an unsuccessful stroke. The demonstration was what is familiarly known as a 'practice drive' without a ball and not on a tee. The plaintiff sued for damages.

Held, that as the plaintiff had not agreed, by going on the course as she did, to take the risk of being injured by negligence, the plaintiff was entitled to judgment.

This case is of interest, as it adds one further decision to the sequence of cases connected with sport, and with a risk that is of frequent occurrence. The point of legal interest is the amount of risk that a person takes upon himself in the capacity of spectator at a game.

It is clear law that a person who is an actual player takes upon himself all the risks incident to that game (Beven on Negligence (4th ed.), vol. i, pp. 114 *et seq.*), and that there is only liability either criminally or tortiously if any harm is done under circumstances which are not usual to the game and constitute in themselves negligent or foul practice. This implied taking of the risk comes under the rule of *volenti non fit injuria*, and to come under this heading the plaintiff must be shown to have not only perceived the danger but appreciated its significance and finally accepted it; knowledge of existing danger may be some evidence of agreement, but it is not, of course, conclusive.

The further question, and the one that had to be decided in this case, is whether the same rule applies to a spectator voluntary or involuntary. To deal with the latter first. There is an old case of *Underwood v. Hewson* (1724) Bull. N. P. 16, where a looker-on was injured by a gun going off while being uncocked: *held*, that an action for trespass would lie.

In *Castle v. St. Augustine's Links Co. and Another* (1922) 38 T. L. R.

615, a public road adjoined the course and one of the 'holes' was parallel to the highway. A taxicab driver, having no knowledge of the course, proceeding along in his motor was struck by a ball, and he was held entitled to recover. It was further held that that part of the course in this instance was a public nuisance.

A decision of greater practical value was that of *M'Leod v. Magistrates of St. Andrew's* [1924] S. C. 960. A girl proceeding along a public footway adjoining a public golf course was struck; and it was held in a majority of seven she could recover, but Lords Hunter and Anderson dissenting considered the plaintiff's argument irrelevant, and that it was a risk of the *locus* of the place.

An oft-cited case is that of *Reid v. Mitchell* (1885) 22 Sc. L. R. 748; 12 Rettie, 1129, where labourers in making a rick had a romp on the rick and one of their number, not actually on the rick but going round adjusting the sheaves, was jumped on from the rick—five feet high—and was injured; but it was held that the plaintiff was working, not larking about—scarcely even a spectator—and that the act was in itself dangerous, and the defendant must be held liable.

A further case of involuntary spectator is *Ward v. Abraham* (1910) 47 Sc. L. R. 252.

In the present case the plaintiff, being a voluntary spectator, took the risks of the game. These, however, did not include negligence on the part of the players. As the jury found that the defendant had been negligent, the plaintiff did not come within the rule of *volenti non fit injuria*.

The defendant raised the further point that the plaintiff had been guilty of contributory negligence, but this was negatived by the jury. Perhaps a jury of golfers might have reached a different conclusion. Ought not a spectator to know that a player is likely to take a practice swing at any moment? But in the present case the evidence showed that the plaintiff was not familiar with the game of golf, and therefore what might have been negligence in a golfer was not negligence in her case.

J. G. W. W.

TORT—TRESPASS—BUILDING CONTRACTOR—DEMOLITION—LIMITED LICENCE
BY ADJOINING OWNER—DUTY TO NEW OCCUPIER—CONTINUING
TRESPASS.

Konskier v. B. Goodman, Ltd. [1928] 1 K. B. 421.

THE owner of certain premises gave a licence to a firm of contractors, the defendants in this action, to use the roof of his premises whilst carrying out demolition work on adjoining property, on the terms that they should make good within a reasonable time upon the completion of their operations any damage which they might have done to his premises. During the process of demolition some débris was allowed to fall upon an inaccessible part of his roof, and this was not cleared away at the end of the operation. Later the plaintiff took a lease of the premises from the owner. Two months after this a heavy rainstorm washed the débris into a drainpipe and choked it, with the result that the water overflowed into the plaintiff's cellar and damaged goods therein.

In the Court of first instance the plaintiff was awarded damages on the grounds of negligence; from this the defendants appealed. On appeal the grounds of the action were questioned, the Court of Appeal holding that the plaintiff could not succeed on negligence because there was no duty of care on the defendants towards the plaintiff: this is shown in *Blyth v. Topham* (1607) Cro. Jac. 158, where Topham dug a pit on a common and Blyth's mare fell into it and perished; the defendant was held not liable because he had no duty of care towards the plaintiff. In *Lane v. Cox* [1897] 1 Q. B. 415, the defendant was the owner of a house which he had let to a tenant, there being no covenants to repair on either side. A workman, the plaintiff, at the defendant's request entered the premises to work and was injured owing to the defective state of a staircase. It was held that the plaintiff could not recover damages because there was no contract, no nuisance, and the landlord owed no duty to the plaintiff. In the present case, in like manner, there was no contract between the plaintiff and the defendant firm and no duty owed by the latter to the former; hence the plaintiff could not succeed on grounds of negligence.

The question remained as to the possibility of the plaintiff succeeding in the action on the ground of trespass; the defendants argued that there could be no trespass because the débris was originally deposited under a licence. Though there might be no trespass *ab initio* in the present case, the continuance of the débris on the roof became a trespass when the licence ended: this is demonstrated by the celebrated *Six Carpenters' Case* (1610) 8 Coke 146 a; the plaintiff here kept a tavern and the six defendants entered as licensees to consume refreshments; they ordered and paid for several rounds, but for the last one they refused to pay: and it was held that although the law gives authority to enter a tavern or common inn, yet if he who enters the inn carries away anything, he shall be a trespasser *ab initio*.

It only remained for the plaintiff to prove that the maintenance of the débris on the premises was a continuing trespass under which he would be entitled to successive actions arising from day to day until the débris was removed. This doctrine is clearly illustrated by *Holmes v. Wilson* (1839) 10 A. & E. 503: the defendants, highway authorities, had supported a road by building buttresses for it upon the plaintiff's land; the plaintiff sued in trespass and accepted money paid into Court in satisfaction, but it was held that the plaintiff had a subsequent action against the defendants for the continuance of the buttresses there.

To prove the existence of a continuing trespass the plaintiff relied principally upon the case of *Hudson v. Nicholson* (1839) 5 M. & W. 437: here the plaintiff possessed a certain close adjoining which were buildings owned by the defendant, who, previous to the occupancy of the plaintiff, had placed upon the close some shores and timber; after the plaintiff had become possessed of the close, the defendant continued to keep these obstacles there so that the plaintiff was unable to build upon the land and suffered damage in consequence. Lord Abinger (at p. 466) held that the continuance of the timber upon the plaintiff's land rendered the defendant substantially a trespasser 'as much as if he had stuck a pole into the land of the plaintiff.'

In *Hudson v. Nicholson* there was a trespass before the plaintiff had entered into possession and a continuance after his entry. So, in the present case, the non-removal of the débris before the entry of the plaintiff constituted a trespass, whilst its maintenance there was, it was submitted,

a continuing trespass: the parallel, therefore, between the two cases was a very close one. Scrutton L.J. held that it followed from *Hudson v. Nicholson* that if the present case had been argued on trespass, there would have been no answer to the claim.

Owing to the modern procedural methods, the Court of Appeal was thus able to uphold the decision of the Court of first instance in the trespass but not in negligence.

[The Court of Appeal did not make it clear how there could have been a trespass by mere omission to remove something which had originally come on plaintiff's land under a licence which had not at that moment been revoked.—Ed.]

G. M.

WILLS—PRESUMPTION OF DUE EXECUTION—EVIDENCE OF REVOCATION.

In the Estate of Lavinia Musgrove. Davis & Mayhew. [1927] P. 264.
96 L. J. P. 140.

THE question for determination by the Court in this case was whether probate should be granted of a will, apparently duly executed, found twenty years after the death of the testatrix among the papers of the executrix after the latter's death.

The facts were shortly as follows: In 1890 L. M. made a will appointing E. M. D. executrix and A. D. sole beneficiary. Fifteen years later L. M. died. Although by 1908 E. M. D. knew of the testatrix's death, she did not propound the will, which was found in 1925 (more than a year after her death) among papers in her possession. The plaintiff, who was the personal representative of A. D., his late wife, propounded the will of 1890, while the defendant, who was the administratrix *de bonis non* of L. M., claimed as under an intestacy.

The will, a printed form filled up in handwriting not proved, contained a formal attestation clause and was on the face of it duly executed, but both the attesting witnesses were dead. All the signatures were proved to be in the handwriting of the respective persons.

In the Court of first instance, Hill J. said that suspicion was excited in his mind that there was something about the document which prevented the executrix from putting it forward as the genuine will of L. M., and that being so, the onus lay on the plaintiff to remove that suspicion, and therefore the maxim '*omnia praesumuntur rite esse acta*' did not apply. He accordingly pronounced against the will. His decision was reversed by the Court of Appeal on the ground that, so long as no suspicious circumstances exist with regard to the will at the time of its execution (as was the case), a suspicion arising from subsequent events that the will was not intended to come into operation can have no effect on its validity; in other words, once due execution is established, the will must be proved, unless there is evidence to show revocation.

On principle, the judgment of the Court of Appeal is clearly right. The decision of the learned judge in the Court below was tantamount to an assertion that a will could be revoked after the death of the testator by the act of a third party, for there was no evidence of revocation by L. M. before him.

The Wills Act, 1837, lays down three ways in which a will may be revoked. First, by section 18, as modified by section 177 of the Law of Property Act, 1925, a will is revoked by marriage. Secondly, by section 20 a will may be revoked by a subsequent will or codicil, or by some writing declaring an intention to revoke the same executed in accordance with section 9 of the Act; and thirdly, by the same section, by burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction *animo revocandi*. Section 20 expressly provides that in no other way shall a will be revoked, and section 19 enacts 'that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.'

When it is remembered that it was not contended that any suspicion attached to the document itself, it would have appeared a necessary consequence that the will was entitled to probate in the absence of evidence of revocation; but Hill J. was apparently misled by a *dictum* of Lindley L.J. in the case of *Tyrrell v. Painton* [1894] P. 151, 157, where the Lord Justice, speaking of suspicious circumstances, said: 'Wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the document.' But, as there was never any doubt that L. M. knew and approved the contents of her will, the case would hardly seem applicable, and in so far as an extended construction could be given to the words quoted they were *obiter* except so far as they were confined to suspicious circumstances attending the preparation and execution of a will. Had the will of L. M. been prepared or executed under circumstances exciting suspicion the learned judge would have been entitled to hold that the plaintiff had not discharged the onus of proof, for it is well settled that the burden of proof of the genuineness and authenticity of a will lies on the party propounding it, and if the conscience of the judge is not satisfied on these points he is bound to refuse probate (*Baker v. Batt*, 2 Moo. P. C. 317). But in the present case the plaintiff had discharged that burden of proof, for the intention to make a will was established by the facts, the attestation clause was in order, the signatures were proved, and the contents appeared from the writing and ink to be an original part of the document. Once these facts are established the onus of proving revocation lies on the person opposing a grant of probate (*Barry v. Butlin* (1838) 2 Moo. P. C. 480; *Guardhouse v. Blackburn* (1866) L. R. 1 P. & D. 109) and, in the absence of evidence, revocation will not be presumed (*Benson v. Benson* (1870) L. R. 2 P. & D. 172).

The present case must not be confused with those cases in which a will, which is traced into the hands of a testator, is not forthcoming at the testator's death, the presumption being that it has been destroyed by him *animo revocandi* (*In bonis Debac*, 77 L. T. 374), for immediately a will is forthcoming, the presumption is at once rebutted.

It may be well to indicate shortly the circumstances in which the maxim '*omnia praesumuntur rite esse acta*' will be applied to wills. Section 9 of the Wills Act, 1837, requires that every will must be signed by the testator or by someone for him in his presence and by his direction; that the signature must be at the foot or end of the will; must be made or acknowledged in the presence of two witnesses present at the same time, and that the witnesses must sign in the presence of the testator. Now it

is obvious that if strict proof of all these facts was insisted upon before any will was admitted to probate, great expense might often be incurred, and in cases where the attesting witnesses were dead proof might be impossible. It is therefore a rule of evidence that where a will is perfect on the face of it, the presumption is in favour of due execution. But if there is no full attestation clause stating that the formalities of execution have been complied with, they must be proved, if proof can be obtained, and if not, the absence of proof accounted for (*In bonis Diaper*, 2 N. R. 215). If, however, the witnesses are dead, and the will has an imperfect attestation clause or no attestation clause at all, the will, if there is evidence that the signatures of the witnesses are genuine, will be presumed to be duly executed. In the case of *In the goods of Peverett* [1902] P. 205, a will was signed by the testatrix and two others both of whom were dead, and there was no attestation clause. The handwriting of one of the witnesses was proved, but there was no evidence as to the handwriting of the other. In spite of this, however, the presumption was applied and the will admitted to probate. In *Lloyd v. Roberts* (1858) 2 Moo. P. C. 158, the presumption was applied although one witness was dead and the other swore that when he attested the paper was blank except for the testator's signature, the testator being a solicitor, and the will in his handwriting.

It will be seen therefore than the presumption is a strong one, and, it is submitted, would have been applied in the present case even if the signatures of the witnesses had not been proved, or, alternatively, if there had been no attestation clause, for both the witnesses were dead.

The case adds nothing to the law of wills, but is a useful reminder that no subsequent change in circumstances which seem to call for explanation, no act of an executor or person other than the testator, nothing, in fact, short of a process prescribed by the Wills Act can revoke a will which has been made by a testator with due formality, and which is free from suspicion at the time of its execution.

J. A. P.

WILLS—CONDITION IN RESTRAINT OF MARRIAGE—WHEN INVALID.

Re Lanyon; Lanyon v. Lanyon. [1927] 2 Ch. 264. 96 L. J. Ch. 487.

RE LANYON is an interesting case, deciding that a gift over on a legatee marrying a 'relation by blood' is void as being equivalent to a general restraint on marriage.

A testator by his will settled property upon trust to pay the income to his son for life and on his decease upon trust to pay the capital to the children of that son provided he (the son) 'does not marry a relation by blood, as I wish to mark my great objection to marriage between blood relations. And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation' then upon certain other trusts.

A summons was taken out by the trustees to determine whether the gift over in the event of marriage with a 'blood relation' was void.

The case raises three interesting points: (1) whether or not such a condition is void for uncertainty; (2) the question as to when a condition in restraint of marriage may be good; and (3) the curious point, which

has apparently not arisen before, as to whether it makes a difference to the validity of a condition that the forfeiture for breach of condition is to be suffered, not by the person breaking the condition, but by his children.

It was argued that the condition was intended to defeat vested interests previously given to the children, and that in order to be valid, such a provision must be of such a nature that it must be possible at any given time to know its limits, and to know whether there has in fact been a breach of the condition or not; but that in the present case it was impossible for the son at any given time to know the limits of the provision or to be sure that the person whom he might marry was not a blood relation. Russell J. held that the condition was not void on the ground of uncertainty because it did indicate in clear terms *what the event was* upon which the defeasance of the interests given were to take effect, namely, marriage with a blood relation, even though there might be difficulty in ascertaining *whether the defined event had or had not occurred*. It would seem that the statement on page 1476 of Jarman on Wills (footnote (f)) that 'it is essential to the validity of such conditions that they should be so framed as to render it capable of ascertainment at any given moment of time whether the condition has or has not taken effect' is incorrect, for Russell J., in commenting on the case which gave rise to Jarman's statement of the law (*Re Viscount Exmouth* (1883) 23 Ch. D. 158, 164) says, 'they do not mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision the nature of which is clearly expressed' (pp. 269-270).

But if the *event* upon which the provision for defeasance is to operate is not clear, the condition will be held void for uncertainty. In *Clavering v. Ellison* (1859) 7 H. L. C. 707, the condition, which was framed in the terms 'And in case any one or more of such children shall be educated abroad,' was held invalid owing to the extreme vagueness of the words 'educated abroad.' Lord Cranworth said (at p. 725): 'Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine.'

Because this could not be said, a provision for defeasance if at any time before a fixed date one or both of two grandchildren should live with or continue under the custody, guardianship, or control of their father, or be in any way indirectly under his control, was held void (*Re Sandbrook* [1912] 2 Ch. 471).

The difference between a condition subsequent and a conditional limitation should be remembered in considering the case. In an absolute gift of property to A, but if he should marry then to B, the condition regarding marriage would be void as being in total restraint of marriage. But a gift to A 'until' he should marry, then to B, is a perfectly good gift.

In the first instance an absolute interest in the property is given, and then taken away on the happening of the specified event; in the second the donee never had more than a qualified interest, and on the happening of the event, nothing is taken away from him, his interest has exhausted itself and merely ceases.

Although, as we have said, a condition subsequent in total restraint of marriage is void as being contrary to public policy, such conditions are

not always bad. By the civil law, conditions restraining marriages were absolutely void, and marriage generally was a sufficient compliance with a condition requiring marriage by consent or with a designated individual, or in certain other prescribed circumstances; but our law has not evinced the same impatience of nuptial restrictions. Thus a condition prohibiting marriage until majority or with a domestic servant (*Jennér v. Turner* (1880) 16 Ch. D. 188) is valid; and a total restriction on remarriage is good (*Allen v. Jackson* (1875) 1 Ch. D. 399). Even though the legatee may be restrained from marrying any one of a very large class of persons, the restriction may be good if it is only partial. A gift over in the event of the legatee marrying a native of Scotland has been upheld by the Courts (*Perrin v. Lyon* (1807) 9 East 170), or a Papist (*Duggan v. Kelly* (1848) 10 Ir. Eq. R. 295), while in *Hodgson v. Halford* (1879) 11 Ch. D. 959, a forfeiture on marriage with a Christian took effect.

In these cases, in which the condition has been allowed to stand, the restraint is partial only; but in *Re Lanyon* the testator went much further. The learned judge held that blood relationship means the relationship subsisting between two or more persons who stand in lawful descent from a common ancestor, and pointed out that the effect of the will would be to fetter the legatee's choice of a bride by the risk of subsequently discovering a common ancestor who landed in Pevensey Bay with William the Conqueror. He did not say, as he might have said, that the effect would be to prevent him marrying anyone at all in view of the fact that any bride he might choose would be a blood relation in virtue of their descent from their common ancestor Adam; but perhaps the Courts do not take judicial notice of him.

The Court seems to have given what was perhaps an unduly wide interpretation of the words 'blood relationship.' It is a cardinal rule of construction that in interpreting wills effect shall be given to the intention of the testator as expressed in the words of the will, and it might be thought that the interpretation given was not consistent with the intention of the testator as manifested in his words 'I wish to mark my great objection to marriage between blood relations.' He was obviously not condemning marriage in general. But the question is, where is the line to be drawn? Might it not be said that the Court would better have been giving effect to the expressed intention of the testator without unduly straining the meaning of his words, if it had construed the words 'blood relation' to mean a relation within the prohibited degrees of consanguinity? To that it might be objected that such a marriage would be void in any event. The testator may have intended his prohibition to extend to marriage with a first cousin, and the Court could have interpreted the condition accordingly. But the whole question is one of considerable difficulty.

On the construction given by his Lordship it is easy to see the great difficulties which would accompany the acceptance of such a clause. The son could contract no marriage with a woman whom he supposed to be a stranger in blood, except subject to the risk that some remote common ancestor would be discovered, and the provision for defeasance operate accordingly. 'He could only be certain,' said Russell, J. 'that he was marrying a blood relation, he could never be certain that he was not.'

Thus, although in terms the restraint was partial only, it was of such a nature that it would result in the probable prohibition of marriage altogether, and was therefore void.

The fact that it was the grandchildren of the testator who were to suffer on breach of the condition, and not the person committing the breach, is novel. It was held that it had no effect on the gift. The learned judge pointed out that it may be that a provision taking away property from A in the event of a breach of condition by B would not operate *in terrorem* of B if A were a stranger to B. But where the relationship of parent and child exists there is some inducement to comply with the terms of the gift and the sanction is more real than it at first appears.

J. A. P.

WILLS—TRUST—EXPRESSED IN WILL.

Re Blackwell; Blackwell v. Blackwell. [1928] W. N. 12. 97 L. J. Ch. 92.

MR. JUSTICE EVE in this case held himself bound by and therefore followed the decision in *Re Fleetwood* (1880) 15 Ch. D. 594. This decision, although never expressly overruled, was regarded as of doubtful authority by the House of Lords in *Le Page v. Gardom* (1915) 84 L. J. Ch. 749, and has been strongly criticized. But until the decision of a higher Court has been given on the point in question in *Re Fleetwood* and in the present case the rule as laid down nearly fifty years ago must be considered the law on the subject.

The relevant facts in *Re Blackwell* were these: a testator gave a legacy to five trustees stating in the will that they were to hold it on the trusts indicated to them, but which were not set out in the will itself.

The details of the trusts were communicated to the trustees and accepted by them before the testator's death, and a memorandum recording them was drawn up by one of the trustees very shortly after the execution of the will.

The questions for the Court to decide were: (1) whether or not parol evidence was admissible to prove what the trusts were; and (2) whether or not the will and memorandum established a valid trust. Both questions were answered in the affirmative. It is in the first of these two questions that the chief interest of the case lies.

Arguing the case from principle the result would seem to be as follows: Where a trust is intended to take effect only on the death of the owner of the property, and to be revocable till then, it must be created by a testamentary instrument executed in accordance with section 9 of the Wills Act, 1837.

To hold otherwise would be to evade the requirements of the Wills Act altogether. But the Act must not be allowed to be used as an 'engine of fraud'; that, too, would defeat the purpose of the Act. Hence if a testator give property by will to a man without stating in his will that the donee is to hold it on trust, and either before or after the making of his will tells him that he is to hold the property on trust for another, and the donee promises to do so, expressly or tacitly, he will be compelled to carry out the trust. It would be a fraud on his part not to carry it out, for his promise induced the testator to make the will, or not to revoke it. The Court will therefore allow parol evidence to be given not merely of the fact that the donee holds the property on trust, but also to show who are the

persons to be benefited. He will hold it for the person named by the testator, and not merely for the residuary legatee or devisee. But if the will expressly states that the donee is to hold the property on trust it might be thought that there would be no room for fraud, no danger of the donee claiming the property for himself, and that being so, that there was no reason for the admission of parol evidence at all. The danger which gave rise to its admission in the first class of cases cannot exist. But in a line of decisions beginning with *Re Fleetwood*, the Courts have held that even when property is expressly given by a will to be held on a trust not disclosed by the will the donee must hold it on the particular trust disclosed by the testator and accepted by him, and parol evidence of that trust will be admitted. Of course, if he never accepted the trust, he will hold for the residuary legatee or devisee, or if there is no residuary gift, for the persons entitled on intestacy.

The same principle applies where a man refrains from making a will on the promise of the person who succeeds on intestacy to hold the property on trust for a specified person (*Re Gardner* [1920] 2 Ch. 523).

If the gift in the will is apparently beneficial, and the beneficiary only hears of the intended trust after the death of the testator, it is no fraud to set up the Wills Act, and the trust will not be enforced.

It remains to be seen whether the Court of Appeal will be invited to consider whether a distinction, which at present has not been established, ought to be drawn between those cases where the will states expressly that the property is to be held on trust, and those in which the will contains no such direction, on the ground that in the former there is no danger of fraud, which might be possible in the latter class of cases.

J. A. P.

BOOK REVIEWS.

The Later Court Hands in England from the Fifteenth to the Seventeenth Century. Illustrated from the Common Paper of the Scriveners' Company of London, the English Writing Masters and the Public Records. By HILARY JENKINSON, sometime Scholar of Pembroke College, Cambridge; Maitland Memorial Lecturer in the University of Cambridge and Reader in Diplomatic and Archives in the University of London. In separate Portfolio:—Alphabets 1 to 20 and Plates I to XLIV. Cambridge: At the University Press. 1927. (45s.)

It is sheer delight to peruse the pages of this sumptuous book. No amateur in palaeography and diplomatic has written its text and selected and edited its alphabets and plates; and no devil in the house of the Press has given it its published form. Both in the writing and in the printing of this fresh and original contribution to learning experts have been at work; and for the scholarship of the author as well as for the skill of the printer all students of the later Court hands in England will be profoundly grateful.

Since Mr. Jenkinson's previous writings on palaeography and archive administration are already familiar to the learned reader, it need only be remarked that in *The Later Court Hands in England* he has carried his studies into a period of development which greatly needed illumination. Mr. Jenkinson has had, in fact, a dual object in presenting us with this book, for he has sought 'to provide the essential minimum of apparatus for a student desiring to master the writings used in English business documents (archives, in fact) of the fifteenth, sixteenth and seventeenth centuries and at the same time to settle the classification and sketch the history of the nine or ten distinct varieties of writing which existed side by side in England at the zenith of that period' (p. 5). Those who fully realize the magnitude of this two-fold project, and who are also conversant with the difficulties incident to its execution, will be the first to congratulate Mr. Jenkinson on the successful completion of his labour. He has not only provided 'an adequate field of exercise for the student of hands and documents' (p. 6), but, in addition, he has established a classification of the hands, with its accompanying nomenclature, which may well prove to be final.

Let it be noted that in Part I Mr. Jenkinson deals with a great variety of subject-matters (pp. 1—120). After a brief introduction, he considers the development of current hands in England, the forms of documents and procedure, materials, languages used in English archives, the teaching and practice of handwriting in England, current letter forms of the fifteenth century, runes, abbreviations, ligatures, conjoined letters and elisions (pp. 1—46). He then passes to a study of the several hands—the bastard hands, the set hands of the fifteenth century, free hands of the fifteenth and early sixteenth centuries, as well as the Secretary, the Italic and Roman, the late mixed, the special set, and the text hands (pp. 47—78). There follow sections on the dating of Court hands, the average hand of the ordinary man, personal marks, paraphs and signatures, symbols and ciphers, numerals, punctuation, accents and the apostrophe, paragraph marks and other conventional divisions, alterations and corrections, decoration, and the reading, interpretation, transcribing and description of manuscripts (pp. 79—112). The appendices to Part I contain a bibliographical summary, a conspectus of archives with special reference to the plates and figures in the book, and a chronological table of plates, showing the language used in each (pp. 113—120). Part II of the book is devoted to transcripts of the plates (which are in the portfolio) with notes (pp. 121—192). The portfolio, which accompanies the work, contains facsimiles of alphabets in twenty different hands and also forty plates reproducing the text of select manuscripts. It should be added that the text of Part I is also illustrated by many reproductions from the manuscripts, including letters of the alphabet, abbreviations, examples of the several hands, personal marks, symbols, numerals, decorations, and the like. A valuable key to the whole work is provided in the Index (pp. 193—200).

So much ground has been covered in Mr. Jenkinson's book that it is difficult to single out points for special notice. The general observation may be made, however, that for students both of palaeography and diplomatic and of English history the book is a practical manual of great value and usefulness: it is, in fact, indispensable. In the history of the science of palaeography the book is, moreover, a record of scholarly original research which illumines more than a few of the darkest recesses of the

past. From the scientific point of view, perhaps the most important contribution which Mr. Jenkinson has made in his present work is contained in those sections where he essays a classification and history of the several hands (see especially pp. 47—80). With the true instinct of the historian, he points out, however, that the hands of the fifteenth, sixteenth, and seventeenth centuries can be studied only in the light furnished by earlier developments. He regards his present work, therefore, as primarily a continuation of *Court Hand Illustrated* (1915), in which he and Mr. Charles Johnson 'took the history and illustration of English business hands up to the year 1500—the date usually fixed for convenience as terminating the medieval period'; and he now carries that earlier story 'up to a point where special study of the handwritings of the past, though it may still be interesting, ceases to be essential.'

Mr. Jenkinson rightly holds that the proper starting-point in the study of handwritings is the Caroline Minuscule, 'which, in an English modification, may be seen in *Domesday*, and from which by a continuous process of development the current hands of the sixteenth and seventeenth centuries were evolved' (p. 3). Indeed, as Dr. M. R. James has observed, the Carolingian Minuscule was 'the vehicle of transmission of the main bulk of the ancient literature. Obscured for a time—ousted, indeed—by the Gothic scripts of the later Middle Ages, it emerged again at the revival of learning, took perhaps a more refined shape at the hands of the humanists, and became [in the history of printing] the parent of the common "Roman" type' (*Cambridge Medieval History*, III, p. 517; and see also Mr. Lowe's essay on 'Handwritings' in *The Legacy of the Middle Ages* (Oxford, 1926), pp. 197—226). Although Mr. Jenkinson stresses the importance of going back to the modified Caroline Minuscule in *Domesday*, he points out, however, that one of his main purposes is to show that 'a notable settling of letter-forms occurred at the end of the fourteenth century in England and elsewhere and that subsequent developments sprang largely from certain conventions which then won more or less general acceptance' (p. 4). Envisaging his subject in the light of these earlier developments, and recognizing at the same time the influences of humanism in the age of the Renaissance, Mr. Jenkinson not only gives us a description and history of the several hands in the period from 1400 to 1700 (see especially pp. 8—20, 33—78), but he annexes a table, in the shape of a genealogical tree, wherein he shows the comparative dates at which the different divisions of the Court hand, from the late eleventh to the seventeenth century, emerge into use (pp. 79, 80).

For the period covered by Mr. Jenkinson's present researches 'Court Hand' is 'to be taken as covering the writing of the ordinary business man and all the special writings used in special kinds of business'; but in the eighteenth century 'Court Hand' came to be 'used only of Legal Hands' (p. 5). In the study of 'Court Hand' in the earlier and broader sense of the term the work now under review will be the *vade-mecum* of all students of English administrative and business manuscripts which come to us from the period which it covers. Unfortunately, as Mr. Jenkinson reminds us, no 'History of Administration and Business Processes in England' is in existence (p. 19); for such a work should be in the hands of everyone who studies the archives which Mr. Jenkinson has brought into the scope of his examination. In the absence of any such companion volume, the student will welcome Mr. Jenkinson's section on the forms of documents and procedure (pp. 18—20), his conspectus of archives (pp. 116—

119), and many passages throughout the work in which the archives receive incidental treatment.

Mr. Jenkinson's remarks on the history of handwriting in the sixteenth century, when English life was affected by close relations with the Continent, and especially by the influence of the thought and practices of the Renaissance, are of much interest (see, *e.g.*, p. 5). For one thing, in the sixteenth century 'the use of writing by all and sundry for their individual purposes becomes for the first time noticeable in this country'; and, moreover, there is not only an elaboration of the business hands of the Middle Ages, but also 'the importation into England of those remodelled hands, fashioned by the new learning in Italy, which were the point of departure for a development that has lasted down to our own day' (see pp. 5 and 47—83). These features of the growth of handwritings in the main century of the Renaissance deserve to be studied in their relation to other aspects of historical development in England during that century, as, for example, the marked tendency to pass from orality to documentation both in educational methods and in modes of judicial procedure. An inquiry of special interest to lawyers would be whether the history of English handwritings in the age of the Renaissance may not have more relation to the history of English Courts and their processes than appears upon the surface. One of the problems in such an inquiry is furnished by the transition, in the sixteenth century, from oral to written pleadings. No doubt this transition was due to a variety of causes. One of them was unquestionably the influence of the Romano-Canonical system of procedure, in which documentation played a prominent rôle; while one of the other causes may well have been the influence upon judicial practice of that general tendency of sixteenth century society to use writings for an increasing number of purposes, a tendency to which Mr. Jenkinson has alluded. In legal and judicial history influences of this character are, from the viewpoint of present-day research, difficult to discover and trace. They generally lie concealed from the modern scholar beneath the surface of the outward manifestations of development; they rarely find expression in historical sources; and, by their generality as factors in progress, by their diffusion throughout society, they work unobtrusively, subtly, and even silently. For these and other reasons they tend to elude the scholar who examines only the documentary evidences of history and who does not pause, in the course of his research, to consider and appraise the forces in the social life of the past that have created them.

Quite apart from its palaeographical and diplomatic learning and its fertility in suggesting lines of research in institutional and legal history, Mr. Jenkinson's book contains much to attract the scholar whose studies are concerned with legal development in England. He will not find it tedious to read the passages on the scriveners and the languages used in English archives; and he will be grateful for the bibliography on languages (see pp. 24—29). He will turn with special interest to those parts of the book which contain the text of select public records (see pp. 122—200; and the Portfolio), illumined by learned notes; he will find, for example, both Chancery and Exchequer records and also plea rolls and writs of the King's Bench. He will also be able to peruse a police report of 1598 (p. 165), the draft for a marriage settlement of about 1466 (p. 188), and feet of fines of 1493 and 1509 (p. 189). From a lawyer's letter of about 1535 (p. 190) he will discover that at least one

professional attorney of the sixteenth century was as serious, when he wrote in his old-fashioned style of 'bargeyn,' 'couenant,' 'assuraunce,' 'leasse,' 'yncombraunces,' 'landes,' and the 'lawe,' as are many of the solicitors and Chancery barristers of to-day when they pen their solemn letters and documents of legal import. There is no humour in the professional writings of lawyers; for men of the law, as Bacon sagely observed in *De Augmentis Scientiarum*, 'being subject and addicted to positive rules,' are of the company of those who 'talk in bonds.'

H. D. H.

A *History of Continental Civil Procedure*. By ARTHUR ENGELMANN, late President of Senate in the Court of Appeal at Breslau, and Others. Translated and edited by ROBERT WYNESS MILLAR, Professor of Law in Northwestern University. With Introduction by WILLIAM SEARLE HOLDSWORTH, Vinerian Professor of English Law in the University of Oxford, and SAMUEL WILLISTON, Dane Professor of Law in Harvard University. Boston: Little, Brown and Company. 1927.

IN his most recent book dealing with 'The Historians of Anglo-American Law,' Professor Holdsworth says, on page 118: 'Moreover, the same Association of American Law Schools, which initiated the *Essays in Anglo-American Legal History*, have done even more than this. They have initiated also the *Continental Legal History Series*, which introduces English readers to the best textbooks of many continental writers on many aspects of legal history of their own countries.' It is, therefore, only fitting that the Vinerian Professor should have contributed an introduction to the present volume which is the most recent of the series. He points out that two facts are so well known to all students of legal history that they can be regarded as truisms. The first is the paramount importance of procedure in early law and its necessary influence upon later legal development. The second is that to understand properly the history of procedure in one country it is necessary to compare its development with that of the procedure in neighbouring nations. He then continues, 'It is these two facts which make this volume, which deals with the history of continental procedure, and the volume which deals with the history of continental criminal procedure, the two most important volumes in this series. They enable students of the history of Anglo-American law to learn quickly and easily the main stages of the growth of the history of procedure in many foreign countries, and to compare that growth with the analogous stages in the history of procedure in their own country.'

It is hardly necessary for a reviewer to add anything to the praise given to this volume by Professor Holdsworth and Professor Williston of Harvard University. It may be convenient, however, to state shortly what the volume contains. Book I is devoted to the Germanic law. Part I of this book contains the history of the medieval German system down to the advent of the Italo-Roman institutions. Part II deals with the medieval Swedish procedure which is traced down to the fifteen hundreds. In

Book II we find a description and history of the Roman system. Book III describes the process of fusion between Germanic and Roman law and the formation in Italy of the Romano-Canonical system, and in a chapter of peculiar interest it describes the procedural principles of that system. Book IV covers the modern history of procedure in Germany, Austria, France, Italy and Sweden.

The book also contains an introductory chapter of eighty pages on 'The Formative Principles of Civil Procedure' by Professor Millar, the editor and translator of the present volume. To the reviewer's mind, this is the most interesting and valuable part of the book, for nowhere else can such a lucid statement of the principles involved in the theory of procedure be found. There is also an appendix on 'Roman and Germanic Elements in Continental Civil Procedure' by Professor Chiovenda. What is the comparative importance of these two elements? The author quotes two conflicting views. Professor Salvioli states that 'in the modern law of procedure very little of the Germanic procedure survives; that instead is the product resulting from the combination of Roman and Canonical institutions.' On the other hand, Professor Schmidt claims that 'the procedural law of to-day is basically a purely Germanic product.' The learned author, who apparently is not swept away by nationalistic feelings which seem strangely out of place in a discussion on the history of legal procedure, expresses his view as follows: 'If we did not deem it prudent to abstain at the present time from general assertions, our statement would be that in the modern law the predominant principles are still the Roman. . . . Continental procedure to-day is even more Roman than a generation ago, for in the case of many institutions legislation and science have carried us back to the pure Roman law.'

A word must be said concerning the authors represented in the present volume. More than half the book is taken from the works of Professor Engelmann, who was presiding justice of the Court of Appeal at Breslau at the time of his death in 1912. Other authors who are represented are Wilhelm Uppström, Johann Schwartz, Professor Glasson, Lorenz von Stein and Professor Salvioli. Finally, particular praise must be given to the editor for the admirable arrangement of the book and his excellent translation. A book of this length is a severe test of the reader. If he were to be handicapped by difficult and clumsy language, his task would prove almost impossible: he owes Professor Millar, therefore, a debt of gratitude for having put foreign ideas into colloquial English.

The History of Contempt of Court. The Form of Trial and the Mode of Punishment. By SIR JOHN C. FOX, late Senior Master of the Supreme Court Chancery Division. Oxford: The Clarendon Press. 1927. (Price 16s.)

THIS book has chosen a particularly opportune time at which to appear, for the recent 'New Statesman' case has made the subject of criminal contempt of Court a matter of public interest. If that case had not taken the course it did it is probable that the whole question of jurisdiction would have been discussed in Parliament. The House of Commons has always been jealous of the power of the Courts in this matter. In

1906 it passed a resolution 'that the jurisdiction of Judges in dealing with contempt of court is practically arbitrary and unlimited and calls for the action of Parliament with a view to its definition and limitation.' In 1908 a bill for the amendment of the law was brought in but it failed to pass. Perhaps this was due to the fact that, although the present law seems to give arbitrary power to the judges, they have administered it so wisely that in practice no amendment is necessary.

The present book is founded in large part on eight articles which the author contributed to the *Law Quarterly Review* from 1908 to 1924. It was immediately recognized as they appeared that Sir John Fox had made a valuable and important contribution to legal history. These articles have been quoted so frequently in legal text-books and histories that it is unnecessary to repeat how sound the work is.

The major thesis of the book can be stated in the author's own words from Chapter I: 'On two points, established doctrines will be attacked; proof will be offered that in early times criminal contempt committed by a stranger out of court was proceeded against like any other trespass in the common law courts, with the assistance of a jury, unless the contempt were confessed, and it will be shown that such contempt was formerly punished by those courts by imprisonment, from which the offender was entitled to obtain his discharge upon making fine, and never by a pecuniary penalty in addition to imprisonment. The evidence will show that the practice of trying contempts out of court summarily and punishing them by the double penalty was first established in the seventeenth century.'

The author does not dispute that the present practice in cases of criminal contempt is established law which cannot now be questioned, but he argues—and we think proves—that it is based on a fallacious doctrine. This doctrine was first 'definitely laid down by Mr. Justice Wilmot in *Almon's Case*, confirmed by Mr. Justice Blackstone, and, in effect, declared by Lord Hardwicke in *Roach v. Garvan*.'

Almon's Case has had a remarkable history. In 1765 a rule *nisi* was obtained by the Crown to attach John Almon, a bookseller, for publishing a libel on the Chief Justice, Lord Mansfield. When the judgment in favour of granting the attachment was ready to be delivered, the judges discovered that the rule *nisi* had been entitled 'The King v. Wilkes' instead of 'The King v. Almon.' 'Mr. Justice Wilmot urged the defendant's Counsel, Serjeant Glynn, "as a gentleman" to consent to an amendment, to which the Serjeant replied that "as a man of honour" he could not.' The proceedings, therefore, had to be abandoned. It was not until 1802, after Mr. Justice Wilmot's death, that his *Notes* were first published. They contained his undelivered judgment in *Almon's Case*. The author remarks: 'Never pronounced in court, this extra-judicial opinion did not possess the binding effect of a decision, but it acquired the singular distinction of becoming a leading authority by citation and approval in subsequent cases, the earliest of which was decided fifty-six years after the opinion was written.'

The last chapter of the book deals with '*Almon's Case* in the United States.' The impeachment of Judge Peck in 1831 in which the doctrine in *Almon's Case* was the principal point in issue is first discussed. Then follows a description of the Act of 1831, by which the jurisdiction of the Courts in contempt cases was limited, and an analysis of the leading cases on this subject: *Toledo Newspaper Co. v. United States*, 247 U. S.

402, and *Michaelson v. United States*, 266 U. S. 42 (under the Clayton Act, 1914). Finally some of the decisions in the State Courts are considered.

Sir John Fox, whose life has been mainly spent in dealing with questions of present-day practice—he was formerly an editor of the *Yearly Practice of the Supreme Court*—is to be congratulated on this lasting contribution to legal history.

It is interesting to note that the Clarendon Press remains true to its spelling of 'judgement.' Perhaps the House of Lords may some day see the light, and give up, what is to the Oxford mind, the obnoxious modern practice of using 'judgment.'

Principles of the Law of Contracts. By the late SIR JOHN SALMOND and PERCY H. WINFIELD. London: Sweet & Maxwell, Ltd. 1927. (30s.)

THE work before us represents the most important contribution in England to the law of contract since Sir Frederick Pollock published his *Principles of Contract* in 1875, and we wish it could have fallen into the hands of a reviewer with more competence and more time to do justice to it. It is more important, in our opinion, than the late Sir William Anson's book published in 1879, because there is more hard thinking in it; nevertheless, for that very reason it may well be that it will not wield the same influence over the present generation of students, upon whom the seductive simplicity of 'Anson' exercises a great attraction.

Professor Winfield took over Sir John Salmond's manuscript, revised it, added many references to cases, wrote two complete chapters (on 'Capacity to Contract' and 'Judicial Remedies') and a number of fresh sections, and re-wrote the chapter on 'Contracts which Require Writing,' from materials supplied by the Honourable Mr. Justice Sim from notes left by the author. Of Professor Winfield's share in the work we shall speak later.

The book, in addition to the usual matters which one would expect to find in a work of this character, includes a welcome and very desirable chapter on the 'Conflict of Laws.' As to the high quality of the work throughout there is, as would be expected, no question. Every page is marked by the thoughtfulness and the analytical powers which are associated with the late author. Nevertheless the work leaves one with an impression of unevenness—not of quality, but of method—as if it had been written at different times and in different moods and in differing circumstances of access to law reports. One general criticism we venture to make is that the work is rather too 'jurisprudential' for a statement of so essentially practical and empirical a branch of law as the English law of contract. The author seems anxious to rationalize it and expound it as a logical whole, but we doubt whether that is possible in the present state of the law. The law of contract is essentially case-law and, we submit, ought to be expounded *from the cases*, at any rate if the exposition is intended for the student. Much of this book does not seem to us to have been written in this way, and this is particularly the case with the first

two chapters dealing with the Nature of a Contract, Undertakings, Conditions, Promises, Warranties, Express and Implied Terms, etc. Indeed, within the compass of the first fifty-eight pages Professor Winfield has only found it necessary to refer to nine cases. The following chapters are less open to this criticism, though the chapter on Consideration, which involves the citation of only fifteen cases, strikes us again as too 'jurisprudential' for a matter which defies systematic treatment and rests almost entirely upon the cases. The treatment of 'valuable consideration' as a species of 'good consideration' is open to question, and we are unable to understand why it should be necessary to explain *De la Bere v. Pearson, Ltd.* (gratuitous answers to enquiries upon investments) by saying that 'there was a good cause of action based on good consideration, which, though not one of profit to the promisor, was nevertheless one of loss by way of trust on the part of the promisee' (p. 81). The only member of the Court of Appeal who dealt with the question of consideration (Vaughan Williams L.J.) clearly regarded the fact of the questions and answers being published in the defendants' newspaper as a benefit to them and therefore consideration for the promise sued on; further, consideration must exist at the time of the promise, and what 'loss by way of trust' did the promisee incur until the contract was broken and the loss *resulting therefrom* occurred?

On the other hand, Chapter VIII on 'Error,' and Chapter XII on 'The Dissolution of a Contract by Frustration,' appear to us to be admirable; we know no author who has tackled the question of frustration with such penetration and success.

Turning to Professor Winfield's own work, we find an excellent chapter on 'Capacity to Contract,' which is clearly written from the cases and which bears evidence of the assistance gained from historical knowledge in understanding and explaining the modern law. This knowledge is particularly necessary and patent in dealing with 'Minors' and 'Married Women.' Professor Winfield is more charitably disposed towards *Stocks v. Wilson* than we should be; and distinguishes it from the decision of the Court of Appeal in *Leslie v. Sheill* on the ground that in the former the defendant stood 'in a fiduciary relation to the plaintiff' and was 'under a duty to account.' What was the 'fiduciary relation,' and how did the 'liability to account' (which Lord Sumner in *Leslie v. Sheill* [1914] 3 K. B. at p. 619 had 'difficulty in seeing') arise?

We venture to regret that Professor Winfield, in his scrupulous respect for Sir John Salmond's text, did not insert his own pages on the requirement of a seal for the contracts of corporations into Chapter VI ('Contracts which Require Writing') and treat it as a question of form, instead of including them in his own chapter on 'Capacity.' Similarly, we have a preference for the treatment of the wife's agency for her husband quite separately from the discussion of her own contractual capacity. Professor Winfield admits the logic, but considers that convenience justifies their treatment together.

Our conclusion is that Sir John Salmond's book is a notable contribution to the law of contract, hardly suited as a first book for the weaker type of student, but full of stimulus for the better student and for the practitioner who is not merely out case-hunting but has time to reflect upon the underlying principles. To Professor Winfield, who has given to it such leisure as he could extract from two busy years, we are profoundly grateful, both for his skill and labour in making available

Sir John Salmond's work and also for the chapters and sections which come from his own pen.

A. D. McN.

The Earliest Lincolnshire Assize Rolls, A.D. 1202-1209. Edited by DORIS M. STENTON, Lecturer in History in the University of Reading. Printed for the Lincoln Record Society. 1926.

THIS latest of the Lincoln Record Society's publications deals with aspects of a neglected period in the history of English law. The 'age of Glanvill' and the 'age of Bracton' have been studied with great care and fruitful results; but the reigns of Richard I and John, the years from 1189 to 1199 and from 1199 to 1216, which lie between the time of Glanvill and the time of Bracton, have never received that full consideration at the hands of the legal historian which they deserve. These two reigns constitute an important period of transition from the legal reforms of Henry II to the more highly developed system of the time of Henry III; and yet, save for brief reference to such matters as the Courts and their rolls and a consideration of the legal significance of Magna Carta, even the longer histories of our law leave them in many respects still shrouded in the mists of obscurity and uncertainty. Our masters in legal history have taught us that the strength of the system of centralized justice established by Henry II was sufficient to preserve the law in difficult times; but of the processes of the law's growth during those times they have told us but little.

One reason why these two reigns have never been adequately studied is that they have left us no important treatise on the law, such as Glanvill or Bracton, from which enlightenment could be sought. In other respects, however, the legal materials of this transitional period are fairly abundant: there are the rolls, the writs, the charters, the final concords, and other sources of like character. A field of inquiry, as yet but little tilled, lies open therefore to the research of scholars. This field makes an attractive appeal; for by piecing together the results of many special studies it will ultimately be possible to gain a detailed and comprehensive survey of a quarter-century when the laws were growing, steadily and progressively, in the direction of that maturer system of common law which Bracton described so lucidly in his great treatise.

The present volume of the Lincoln Record Society is especially welcome, therefore, as one of the most important of the recent contributions to our knowledge of this transitional period. It contains not only the Lincolnshire Assize Rolls from several years of John's reign, 1202 to 1209, but also, because many cases heard at Lincoln in 1202 went to Westminster to be further considered, extracts from the Curia Regis Rolls. All the Lincolnshire cases in the Curia Regis Rolls from Michaelmas, 1202, to Easter, 1203, are here printed; but there has been no attempt to print those of an earlier or later date in the reign. In 1202 the justices appear to have been acting under the commission of an *iter ad omnia placita*; while in 1206 they had a commission of more limited scope which included the hearing of assizes, the delivery of gaols, and the receiving of appeals

touching crimes (see pp. 37—42). The volume presents us, therefore, with an early and instructive illustration of the differences between two kinds of commission. As Maitland remarked, 'a commission to take assizes is an utterly different thing from a commission to hold a general eyre,' a commission *ad omnia placita*, civil and criminal (see Pleas of the Crown for the County of Gloucester, p. 21; and compare Bolland, *The General Eyre*). 'The work of the judges in 1206, Mrs. Stenton points out, 'was no less important for the preservation of order than it had been in 1202, but there were no Articles of the Eyre to be laid before the jurors. There were no solemn verdicts of the jurors of the wapentakes and towns to be recorded. The judges seem to have been commissioned to do the work that lay to hand' (p. 41).

Since our extant plea rolls have their beginning in the fifth year of Richard I's reign, 1194, the rolls of the first years of the thirteenth century printed in this volume are, therefore, among the earliest judicial records of England; and, in continuation of the rolls which come from the later years of the twelfth century, they are in fact a valuable addition to our oldest case-law. To the historian the value of this collection of early cases is, moreover, greatly enhanced by Mrs. Stenton's Introduction, both learned and illuminating, which is to be regarded as a continuation of her previous study of the legal reforms and experiments of the reign of Henry II (see *Cambridge Medieval History*, vol. v, chap. xvii). Using the excellent indexes as a key alike to the Introduction and the rolls, the constitutional and legal historian will gain from this volume many glimpses of the practical working of that system of royal justice which Henry II had established and which Glanvill, one of his justices, had partially explained.

The volume contains much useful information in regard to several legal aspects of the reign of John. Of the topics of special interest attention may be drawn to the Courts, especially the Eyre Courts held by the itinerant justices, and their procedure; the writs; the jury; sheriffs; attorneys; the King's peace; crimes; civil pleas; charters; final concords; warranty. For the historian of the office of chief justiciar the volume has materials to offer; and it also gives him knowledge respecting a famous holder of this office, Geoffrey Fitz Peter, one of the first laymen in England distinguished for his learning in law. On deodand, ordeal, duel, outlaw, frankpledge, marriage portion, treasure trove, villeinage, and similar subjects, there are also entries in these rolls.

Not the least interesting parts of the Introduction are those devoted to biographical sketches of Geoffrey Fitz Peter, Eustace of Fauconberg, Simon of Pateshull, and some of the other justices in eyre, who in the Johnian age were helping to carry out the great project of Henry II. Upon the working of the writ system, and more particularly the employment of the possessory assizes instituted by Henry II, much new light is thrown; and, since the writs were the very *corpus* of the law, this additional knowledge of them is to be treasured. Nor should the service rendered by the editor in comparing the law in Glanvill with the law in these rolls of John's time be overlooked. The justices of the King, as they held their eyres in Lincolnshire, were moulding the earlier law to meet the needs of their time; and among those justices Simon of Pateshull, who even in his own day had acquired the reputation of being a great judge, was easily the ablest. Martin of Pateshull, Simon's clerk, who attended him on his circuits, seems to have been particularly

interested in his judgments; and no doubt from this able judge of John's time Martin of Pateshull learned much of his own law. The Lincolnshire rolls contain several valuable statements of law by Simon and his fellow judges; and, indeed, as the editor remarks, the work of these men was 'bridging the gulf between Glanvill and Bracton.' The link between the two Pateshulls is of special interest. Revering Martin of Pateshull, who was among the greatest of Henry III's judges, as one of his masters, Bracton not only incorporated many of his judgments in the Note-Book, but also used them as one of the chief foundations of the *De Legibus*. Since Martin was Simon's clerk and, in a sense, his pupil, more than a little of the legal learning in Bracton's famous treatise may be originally due, therefore, to the elder, and not to the younger, of these royal justices, who, each in his own time, contributed so much to the progressive development of our early common law.

H. D. H.

The Table Talk of John Selden. Newly edited for the Selden Society by its Literary Director, the RT. HON. SIR FREDERICK POLLOCK, BART., from a MS. hitherto uncollated. London: Quaritch, 11 Grafton Street. 1927. (7s. 6d. net.)

RICHARD MILWARD, of Trinity College, recorded in a series of notes scraps from John Selden's conversations during the twenty years previous to the latter's death in 1654. The notes were hastily, perhaps surreptitiously, printed and published in 1689. Six manuscripts are known; that from which this edition has been prepared was acquired by Lincoln's Inn in 1909. It is appropriate that its text should be edited for the first time by one who is both so distinguished a member of Milward's College and literary director of the Selden Society. And besides, the *Table Talk* has, Sir Frederick tells us, been a favourite book of his for more than half a century.

This manuscript stands, in Sir Frederick's judgment, in a class by itself, and it has been his object to enable the learned world to decide whether it provides the best foundation for a future editor's labour. He has not aimed at a final settlement of the text, nor has he written a new commentary. He gives high praise to the work of the Rev. Samuel Harvey Reynolds, whose edition of 1892 he hopes that the Clarendon Press will soon re-issue. After account has been taken of the emendations now made certain or highly probable, Reynolds' notes could stand, we are told, with very little correction.

Fortunately, Sir Frederick has given us a few of what he calls occasional and not strictly necessary remarks, thrown in to please himself. We wish that he had thrown in a few more, to please us. We refer to two which may interest undergraduate readers.

'The best argument,' says Selden, 'why Oxford should have precedence of Cambridge is the Act of Parliament by which Oxford is made a body, made what it is, and Cambridge is made what it is, and in that Act it takes place. Besides, Oxford has the best monuments to show.'

Sir Frederick comments as follows: 'The Act referred to is 13 Eliz. c. 29. The question of precedence was discussed in the House of Commons

early in 1641 (see Reynolds' note).^{*} No doubt is now entertained that Oxford is the more ancient university, though not by very much. What Selden meant to include in "the best monuments" is not clear.'

Our other reference is to an interesting excursus on the estates of the realm. 'The three Estates are, the Lords Temporal, the Bishops and the Clergy, and the Commons, the King is not one of the three Estates as some would have it (take heed of that), for then if two agree, the third is involved, but he is the King of the three Estates.' (The text is obviously corrupt.) Sir Frederick gives us the history of the controversy, with due recognition of the work of Professor Pollard. The use of 'estate' as a political term came to England as an exotic, and when introduced from the Continent had already ceased to fit our institutions, if it ever did. Abroad it would have occurred to no one to call the King an estate, but here, as the conception was obsolescent, the term was exposed to the deformation to which exotic terms are liable. A practical cause which gave currency to the deformation was the desire to rebut the extravagant claims of the Bishops to have a separate collective voice in Parliament as an estate, and therefore a veto on legislation.

A reprint of the life of John Selden, written for the Dictionary of National Biography by the late Sir Edward Fry, has been conveniently added by kind permission of the Clarendon Press.

H. A. H.

The Law, the Advocate, and the Judge. A Reading delivered before the Honourable Society of the Middle Temple, May 19, 1927. By the HON. MR. JUSTICE MCCARDIE. Reprinted from *The Solicitors' Journal*. London: The Solicitors' Law Stationery Society, Ltd. (2s.)

THE re-establishment, after an interval of nearly two hundred and fifty years, of the ancient practice of delivering Readings in the Hall of the Honourable Society of the Middle Temple is an event of no little significance in the history of the legal profession and of legal education in England. The system of legal education in the Inns of Court, created in the Middle Ages, attained its fullest development in the first half of the sixteenth century. Readings and Moots were important features of the system; and some of the Readings by distinguished lawyers are still valued by the profession as contributions to our legal literature. This 'golden age' of the Inns of Court as educational bodies was followed,

^{*} The question arose on the discussion of a subsidy Bill. Mr. Wallace Notestein, in his edition of the Journal of Sir Symonds D'Ewes, tells us (p. 212) that a debate on the relative precedence of the two universities seems to have been a regular part of the passage of a subsidy Bill. On this occasion Sir Symonds D'Ewes, a learned antiquary, made a spirited speech in support of the claims of Cambridge. It is worth reading in Nalson's Collection of the Great Affairs of State (vol. i, p. 703). He concludes: 'It appearing therefore so evidently by all that I have said that Cambridge is in all respects the elder sister (which I speak not to derogate from Oxford), my humble advice is that we lay aside the present question as well as to avoid division amongst ourselves as to intomb all farther emulations between the two sisters, and that we suffer the present Bill to pass as it is now penned; and the rather because I think Oxford had the precedence in the last Bill of this nature that passed this House.'

however, in the second half of the sixteenth and the early part of the seventeenth centuries by a period of decline. During the Commonwealth period the educational system of the Inns collapsed; and although efforts were made to revive it after the Restoration, it never recovered, and in fact soon ceased to exist. In the final stages of the system Benchers who declined to read were not only fined and suspended, but even reported to the judges. In 1684 there was delivered the last Reading in the Middle Temple; while in 1685–1686 the chosen Reader in the Inner Temple, having paid £150, was declared to be at once ‘an absolute and complete Reader’ (see Holdsworth, *History of English Law* (3rd ed.), vol. ii, pp. 506–508; vol. vi, pp. 481–499). In 1800 ‘there was really no legal education at the Inns of Court’ (*A Century of Law Reform*, 1901, p. 32); and, indeed, not until the latter part of the nineteenth century was there a re-awakening of interest in the Inns in the education of their members. The Council of Legal Education was established by the Inns; and, in addition to the lectures and examinations provided by this body, there has been in recent years a revival of the Moots in the Inns themselves. The delivery of his Reading in the Middle Temple by McCardie J., as Reader of the Inn, marks the renaissance of still another feature of the older educational system of the Inns. It is to be hoped that this notable example will be followed not only by McCardie J.’s successors at the Middle Temple, but also by the Readers of the other Inns of Court.

Those who are familiar with McCardie J.’s career as one of the most learned of His Majesty’s judges, do not need to be reminded of the fact that in his judgments he has made a valuable contribution to the literature of the common law. In his Reading he has drawn not only upon his store of legal learning, but also upon his experience at the Bar and on the Bench; and he has given us, therefore, in this address on ‘The Law, the Advocate, and the Judge’ an exposition of topics upon which he has the right to speak as an expert. His address is in keeping with the best traditions of the office of Readership in the Inns of Court; and both in respect of its broad theme and its depth of thought it is exceptionally appropriate as the inaugural Reading in the present period of the renaissance of legal study in the Inns. While it embodies some of the results of the author’s research in legal history and legal theory, it has in it also much of his own personality. It speaks to us of the dignity and sacredness of the Law, the high calling of the advocate, and the independence and fearlessness of the judge; and in every lawyer, whether he be young or old, it must awaken, or re-awaken, a sense of the nobility of his chosen profession. If perused in the proper spirit the Reading should, however, do even more than this for every lawyer; it should arouse in him a deeper realization of the responsibilities that are laid upon him—responsibilities not only to his client, but also to the State and the Law. To the student of law the Reading also has teachings which should not be disregarded; for of the lawyer of our own day it demands both wide culture and great knowledge.

Although many points of interest have been considered by the learned Reader, only two or three can be mentioned in the present place. Let his definition of law be one of them. McCardie J. defines law in the following terms: ‘Just as the nation is more than the aggregate of citizens, so the law is, in my view, more than a mere aggregate of statutes and orders and decisions. It is a great unifying and controlling institution placing upon each his duties, giving to each his right and

enforcing from each his obligations' (p. 14). Implied in this definition is the distinction between 'a law' and 'law,' the *loi* and *droit* of French and the *Gesetz* and *Recht* of German legal scientists. Geldart drew attention to the distinction; and although he spoke of law as 'a system which orders our conduct,' by this phrase he meant to convey what is in effect the same idea as that which McCardie J. has expressed by speaking of the law as 'a great unifying and controlling institution' (see Geldart, *Elements of English Law*, pp. 7—9). While, however, the two conceptions of law are essentially the same, there is a difference between them in one respect; and this difference is apparent if one studies the literary context of the two definitions. Geldart lays emphasis upon substantive law, the 'system' composed of rules and principles which have relation to one another and which may be analyzed; McCardie J. appears to stress the importance and influence of adjective law when he speaks of the law as an 'institution.' Although both these aspects of law are essential to a grasp of its nature, the prominence of the Courts and case-law in English legal development easily leads the English lawyer to think in terms of the institutional machinery of the law as opposed to the *corpus* of its rules and doctrines.

As President A. Lawrence Lowell has observed, 'the historic position of the Royal Courts of Justice has affected profoundly the English conception of law, and this has in turn influenced both the course of legislation and the authority of the Courts themselves. To English-speaking people, whether lawyers or not, law means a body of rules enforced by the Courts. . . . The essential is that what the Courts recognize and enforce is law, and what they refuse to recognize is not law' (*Government of England*, vol. ii, p. 473). If this be also McCardie J.'s view of the nature of law, it should be studied in relation to his remark that 'the laws of England to-day are, in substance, public opinion itself. Those who mould public opinion can mould the laws that govern our people' (p. 15). It is clear that the learned Reader is not thinking here of the influence of public opinion upon the judicature, for in his view the judges, who 'are not a branch of any government department,' 'aim only at the ascertainment of truth and the declaration of law as they think it to be,' 'recognize no political party,' 'bow to no suggestion of passing expediency,' 'seek no popularity,' and 'will not yield to the passing winds of popular excitement, whatever the direction in which those winds may blow' (pp. 25 and 26). He is no doubt thinking of the moulding of the laws by public opinion through the instrumentality of the executive and legislative organs of the State. But even here the jurist is faced by the dispute as to whether statutes are laws or only sources of law. If he agree with Gray he will hold that statutes are only sources of law, and that the law is 'composed of the rules which the Courts lay down for the determination of legal rights and duties' (Gray, *Nature and Sources of the Law* (2nd ed.), pp. 84, 98, 124, 125, 170—172). But whichever view be taken as to the nature of statutes, public opinion can mould the decisions of the Courts only by moulding the statutes which the Courts interpret; and no doubt this is the point which the learned Reader had in mind when he remarked that 'the laws of England to-day are, in substance, public opinion itself' (p. 15).

McCardie J. also adverts to legal science. 'Law, after all,' he says, 'is but a branch (though a great branch indeed) of what is perhaps the widest science of all—the science of sociology' (p. 13). The sociological

aspect of legal science is mentioned by the learned Reader in another part of his address. Speaking of the advocate of to-day, he remarks: 'There never was a time when the barrister had greater need of a wide culture and of a full acquaintance with history, with economics, and with sociological science' (p. 22). From certain points of view legal science is no doubt a branch, and an important branch, of sociological science; but at the same time, this description of legal science needs more than a little explanation in the light of the literature that has grown up about it (see, e.g., Pound, *Interpretations of Legal History*, pp. 21, 71—74, 84—85).

There are several passages in the Reading which, in addition to those already mentioned, refer to the nature of law and the science of law (see, e.g., pp. 14, 15). Law and the science of law are two different matters; but yet they are matters closely related to each other. Our ideas of what constitutes legal science largely depend upon our views as to the nature of law and the modes of its growth and enforcement. Although McCardie J. has expressly refrained from discussing the 'subtleties of jurisprudence' in his present Reading (p. 13), it is to be hoped that he will find a future opportunity both of expanding his ideas as to the nature of law and of the science of law and of expounding his conception of the relation between them.

The Reading will repay perusal for reasons other than those already indicated. It contains a fine tribute to the Common Law (pp. 15—17), an illuminating treatment of the subject of the advocate's characteristics, duties, and opportunities (pp. 18—24), and a just appreciation of the independence and duties of the judge (pp. 25—28). The Reading embodies not only wisdom and humour, but also a broad outlook on the past and present of our system of justice. It contains, moreover, more than one suggestion as to legal reform; the suggestion, for example, 'that our guiding rule of obedience to precedents may some day need modification' (p. 15). McCardie J. has mentioned 'the contrast between the methods and the policy of the common law judges and the methods and policy of Parliament,' as a subject which might well occupy a future Reader (p. 15). The discussion of the problem as to precedents might, with propriety, form a part of the discourse of that future Reader.

H. D. H.

A History of the Crime of Blasphemy. By G. D. NOKES, LL.D.
London: Sweet & Maxwell, Ltd. 1928. (16s.)

THIS book is based on part of a thesis approved for the degree of LL.D. in the University of London. If we may judge of the whole thesis from this portion of it, the examiners of Dr. Nokes must have congratulated themselves on having to deal with a candidate so learned and so lucid. The pages of this little volume are closely packed with material, much of which is drawn at first hand from old pamphlets not easily accessible or from manuscript rolls in the Public Record Office. The author has arranged his matter well and presented it clearly. Every reference that I have verified has proved to be accurate; and I have not detected a single error of the press.

The chapters of the book are only two in number. One concerns the

common law, and contains a hundred and twenty pages; whilst the other, on the statute law of the subject, consists of thirteen only. This contrast in bulk is significant; indicating that the legal rules about blasphemy are due far more largely to the zeal of the judges than to that of the legislature or the electorate. The chapters are followed by three Appendices. One of these consists of twelve useful pages on current practice; whilst the other two, in minutely tabulated form, summarize chronicles of the prosecutions of more than two hundred offenders.

At the present day, the line between the sphere of jurisprudence and that of theology is drawn sharply. We have moved far from the period when Coke could gravely say that 'To disturb a preacher is to disturb God' (2 *Bulstrode* 53). And even beyond the time when, two hundred years later, Mr. Justice Best could seriously maintain (4 *Bing.* 628) that 'There is no act which Christianity forbids, that the law will not reach'; though he certainly had never seen—in Lord Cranworth's phrase—'a man indicted for not loving his neighbour like himself.'

The right of calm discussion, even on questions the most sacred, has been won; men recognize it now as the necessary path to knowledge. It was by a bishop, and in a volume of sermons, that we were recently told (to cite Dr. Barnes' own words, p. xviii) that 'Only by argument, patient and clear and cogent, can error be banished and truth affirmed.' But it has taken long to bring our law to this conclusion. For centuries the State deemed it necessary to punish the expression of unorthodox opinions on religion.

This was originally the function of ecclesiastical Courts alone. But as early as 1614 there occurred the first reported prosecution in a common law Court for such an offence. The offender, Nicholas Atwood, was apparently not a sceptic but a Romanizer; he objected to the 'newness' of the established church, and maintained that 'Preaching is but prating,' and that devotional services were more edifying than any sermons. It was only by a Court of Quarter Sessions that he was convicted. But the conviction was confirmed by the King's Bench (*Rolle Abr.* 2, 78) on the ground that the words, though they concerned matters spiritual, tended to a secular evil, namely, the disturbance of the peace. In 1675 the rule of law was laid on a secure foundation by the decision of the King's Bench, in *R. v. Taylor* (1 *Vent.* 293), that 'wicked blasphemous words are . . . a crime . . . punishable in this Court.' Hale L.C.J. added his oft-quoted statement that 'Christianity is a parcel of the laws of England.'

Blackstone, a century later, accepted that statement, and held it to be criminal to deny the being, or the providence, of God, however calm and temperate the manner of denial might be. But early in the nineteenth century 'a singular effect upon the law'—as Dr. Nokes says—was produced by the influence of a Cambridge teacher. During the last twenty years that he held the Downing chair Starkie never gave any lectures, but occupied himself still more usefully by writing textbooks of great value. In one of them, on *Slander and Libel* (p. 599), he modified Blackstone's doctrine, by limiting the offence of blasphemy to cases where there was 'a wilful intention to insult.' In the epoch-making prosecutions of Mr. Bradlaugh and Mr. Foote in 1883 (15 *Cox* 217 and 231), Lord Chief Justice Coleridge cited Starkie's words, and ruled in accordance with them. He added 'I lay it down as law that, if the decencies of controversy are observed, even the fundamentals of religion may be

attacked without the writer being guilty of blasphemy' (15 Cox at p. 238). The tide had turned. Both in the High Court and at the Old Bailey I have watched prosecutions for blasphemy. Very impressive was the contrast between what the reports of similar trials record as to the attitude of the judges of a century ago towards such offenders and the impartiality and courtesy which I saw shown by their modern successors. Indeed, even popular feeling as to State interference with the expression of mere opinion had undergone a change; a change due in some measure to the publication in 1859 of John Stuart Mill's convincing *Essay on Liberty*, the most carefully written of all his works. (By a curious coincidence the plan of the volume first occurred to him on the Capitol at Rome—the very place where the idea of writing the *Decline and Fall* first occurred to Gibbon.)

Dr. Nokes seems to be, in matters of literature, an austere and exacting censor. For he condemns as 'tedious' (p. 116) the pungent pages in which Jeremy Collier denounced the dramas of his day. Yet to Macaulay—and probably to nearly all its readers—Collier's little volume seems to sweep through 'all the modes of ridicule, from broad fun to polished sarcasm.' But in matters of law Dr. Nokes happily shows no similar severity. In them he is an impartial critic; ready, for instance, to vindicate (pp. 49–64) the seventeenth-century judges against the numerous attacks which the law reformers of Victorian days made upon them for 'inventing a new crime.'

Dr. Nokes has restricted his book to matter purely historical; refraining altogether from discussing what form the law ought to take on this topic. Yet his thorough knowledge of the history of his subject gives him the best of qualifications for such a discussion—a qualification too often lacking in those who attempt to plan legal ideals. Perhaps a clue to his views on the law of blasphemy may be found in the typographical preference which makes him refuse to the words 'deity' and 'bible' the accustomed initial majuscule, as if in emulation of a course temporarily adopted by Lord Morley in his hot youth. Our author certainly would not consent to return to the stringency of the old law, now finally overthrown by the House of Lords in *Bowman v. Secular Society, Ltd.* [1917] A. C. 406. But would he abandon even the check it still imposes upon vilifications so expressed as to be likely to exasperate those upon whom they are intruded? That check would be abolished by Mr. Lansbury's 'Blasphemy Laws (Amendment) Bill' of the present session. Going straight to its work, with a brevity most refreshing to any wearied student of our Parliamentary legislation, it proposes to enact simply that

'After the passing of this Act no criminal proceedings shall be instituted in any court against any person for schism, heresy, blasphemy, blasphemous libel, or atheism.'

Yet even so uncompromising an advocate of free speech as J. S. Mill conceded that 'The manner of asserting an opinion, even though it be a true opinion, may undoubtedly be very objectionable; and may justly incur severe censure' (*Liberty*, p. 96). Feelings which, whatever a man may think of their validity, he must admit to be certainly amongst the deepest and most widespread emotions of mankind, deserve—as Indian experience vividly shows—public protection against wanton insult. Even so pronounced an agnostic as the late Professor Huxley could declare that 'heterodox ribaldry disgusts me rather more than orthodox fanaticism'

(*Life and Letters*, II, 322). On this still unsettled question of legislative policy the opinion of Dr. Nokes would be valuable; and it is to be hoped that, some day soon, he will give it to the world.

Meanwhile he deserves our thanks for having done his present task well; so well that no one now need do it over again. The publication of his book marks an era in this curious and interesting branch of legal history.

COURTNEY KENNY.

The British Year Book of International Law, 1927. Humphrey Milford. Oxford University Press. (16s.)

THE 1927 issue of the *British Year Book of International Law* is fully as comprehensive as its predecessors. The outstanding contribution is Mr. H. W. Malkin's, on 'The Inner History of the Declaration of Paris.' He had access to unpublished materials in the Windsor archives and in the Foreign Office, and has produced a fascinating study of the able British diplomacy leading up to the Declaration and of its approval by the British Cabinet. By this transaction Great Britain surrendered her claim to seize enemy non-contraband goods on neutral ships, which was becoming increasingly difficult to maintain, in return for the permanent abolition of the most undesirable institution of privateering.

The law of peace is represented by two important contributions, of which it was almost inevitable that one should discuss the *Lotus Case*, and the question of criminal jurisdiction over foreigners generally. Mr. Beckett's careful analysis of this intricate subject, in which all conflicting theories are supported by at least some authority, is based upon a consideration of the varying views of the judges in *R. v. Keyn*. On the point raised in that case concerning the forum competent to try offences caused in one jurisdiction and taking effect in another, it seems to be fairly clear—at any rate for Anglo-American law—that the act is done within the jurisdiction in which it takes effect. It is interesting to note that in an old homicide case at Canton before treaty days, the Chinese held precisely the same view. In 1784 a gunner of the *Lady Hughes*, firing a salute on the Canton River, killed a Chinese on shore. The Chinese claimed jurisdiction. The East India Company resisted, not on the ground that the act was committed on board a British vessel, as this would have been at variance with *R. v. Coombes*, but on the more general ground that Chinese jurisdiction over Europeans could not be recognized at all. There are other similar cases from this period of Anglo-Chinese intercourse. Dr. Lauterpacht has rendered a service to international lawyers by assessing the influence of Spinoza upon the development of the science.

Professor Pearce Higgins extends his consideration of naval warfare by discussing the right of retaliation, and the extent to which the exercise of this right may adversely affect neutrals. Professor Brierly's contribution discusses the proposal to establish an international criminal Court, and reaches the conclusion that the establishment of such a Court is surrounded with difficulties, and is hardly at present desirable. On the question of the trial of war criminals, however, Professor Brierly notices that trials by the victors of criminals of the vanquished State are also

undesirable since, even if actual injustice is not present, there is at any rate a suspicion of it, and the scheme is one-sided. On the other hand he urges that 'trial by the offender's own national Courts is not satisfactory, as the Leipzig trials have demonstrated.' Unsatisfactory from the point of view of punishment these trials unquestionably have been, but at any rate the principle has been established, *by the tribunals of the accused*, that for violations of the laws of war, punishment may be exacted. The moral effect of this is perhaps a gain which totally outweighs the unsatisfactory nature of these trials from other points of view.

Of the remaining two articles, that of Mr. Mootham traces the origin of the Doctrine of Continuous Voyage, whilst the contribution by Sir John Fischer Williams attacks the question of denationalization—a feature of recent municipal legislation which will sooner or later produce a crop of awkward problems in practice. Just as nature is said to abhor a vacuum, so international law abhors a stateless person, and the author reaches the conclusion that 'a state cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other states, of receiving back a person denationalized who has acquired no other nationality, should he be expelled as an alien by the state where he happens to be.' To what extent a state ought to hand back a denationalized alien to his country of origin is, of course, another matter entirely. Should China, for example, hand back a denationalized Russian to the Soviet, the consequences might result in considerable hardship to the individual concerned. Can it be argued, therefore, that there are any *legal* limitations on the exercise of this right?

G. W. K.

Private Law Sources and Analogies of International Law. By H. LAUTERPACHT, Dr. Jur., Dr. Sc. Pol., LL.D. Longmans, Green & Co., Ltd. 1927. (25s. net.)

DR. LAUTERPACHT has made a valuable and scholarly addition to the literature on international law. There has been a good deal of adverse criticism—some of it quite just—on the practice of conducting the argument of a question of international law by pure analogies to civil law. The learned author deprecates the rejection of this mode of reasoning, and develops the thesis that in the great majority of cases its employment has had a beneficial influence on the development of international law. It seems to us that Article 38 (3) of the Statute of the Permanent Court of International Justice, by adopting 'general principles of law recognized by civilized states' as ancillary sources of law for use by the Court, made Dr. Lauterpacht's view not only correct but also inevitable. A book of this kind was bound to come sooner or later, and it is satisfactory that it has been written by one who is an expert. He does not lose sight of the dangers of pressing the analogies of private law too far. There are two pitfalls in the method that need careful fencing. One is the possibility of two lawyers, each bred in a different system, opposing to one another arguments which seem to run on parallel lines merely because neither advocate, owing to his lack of acquaintance with the other's system, can get any true appreciation of the point that is being made. The other is that private law may be destitute of any analogy

that is really helpful to the solution of a new problem of international law. We believe from our own investigations of such topics as aerial sovereignty, state succession, and mandates, that more harm than good has been done by urging too strongly similitudes in private law. The fact is that neither the English common law nor Roman law had any theory worth the name relating to ownership of the air—much less one that could aid international lawyers in founding rules of law as to aircraft. So, too, there is too faint a likeness between the original idea of universal succession in Roman law and that of succession in the common law to assist the development of state succession. And the medley of legal conceptions in mandated territories becomes a worse confusion if reliance be placed on the Roman law *mandatum*. In cases like these the 'positivist,' or *a priori*, argument may properly be used, and there is little fear that the Permanent Court will have to listen to the dishonest rubbish which, under this guise, has occasionally been inflicted on arbitral Courts in time past.

It appears from Dr. McNair's foreword to the book that Dr. Lauterpacht was one of his pupils. We offer our congratulations to both teacher and pupil.

P. H. W.

The Law of Evidence. Some Proposals for its Reform. By EDMUND M. MORGAN, ZECHARIAH CHAFEE, JR., RALPH W. GIFFORD, EDWARD W. HINTON, CHARLES M. HOUGH, WILLIAM A. JOHNSTON, EDSON R. SUTHERLAND, JOHN H. WIGMORE. Yale University Press. Humphrey Milford. Oxford University Press. 1927. (7s. net.)

THE Legal Research Committee in the United States appointed a committee, consisting of the leading specialists in the law of evidence and some judges, to consider reforms in that branch of American law. This small and extremely valuable and interesting book is the result, the names of the committee appearing as authors. In every branch of their inquiry—in its limits, in its methods, and in its recommendations—they display the energy of reformers and the sagacity of practical men. Most reformers spoil their chance of success by attempting too much. These wisely recognized that some of the evils in existing rules are not outrageous or not readily amenable to the machinery of investigation which the committee used; and that others are gross, but not amenable at all to such examination. Many reformers, again, pin their faith on theoretical improvements, without much regard to the material that must be sifted before a sound practical amendment of the law is possible. These employed assistants to compile facts with respect to the working of the existing rules of evidence, and some idea of the industry which this involved may be gathered from the fact that it took five years for the committee to complete its task. Yet this book is not a hundred pages in length. Its importance is in inverse proportion to its bulk. The recommendations are reducible to five in number, and an English reader's first comment might well be, 'But most of this is already law in England, and much of it has been law here for a long time.' This is not to plume ourselves on our superiority, for historically we were slow enough in

getting a fairly rational system of legal proof. Nor are we entitled to balance that by saying that America started as a nation much later in the history of civilization than we did. For what Englishmen constantly forget is that there are some fifty jurisdictions in the United States, and how difficult this makes any universal reform of the law. But, making every allowance, it does seem puzzling that in forty-two states the trial judge is prohibited from commenting on the weight or credibility of the testimony. Given a couple of unscrupulous advocates, is it remarkable that in a jury trial, 'some judges go to the extent of spending their time in reading a newspaper, writing letters, or chatting with friends'?

We offer our sincere felicitations to the committee on their work and we hope that legislation will crown it with the success which it so well deserves.

P. H. W.

Law in the Making. By CARLETON KEMP ALLEN, M.A., M.C., Fellow of University College, Oxford, and University Lecturer in Theoretical Jurisprudence. Oxford: Clarendon Press. 1927. (21s.)

It is refreshing, after the flood of nebulous dissertations on the subject of Jurisprudence and political science to which we have become accustomed in recent years, to meet with so sane, well-balanced and intelligible a work as the book under review.

If jurisprudence is to maintain its place as a subject of study, its exponents must adapt their theories to the concrete facts of social intercourse and development and express them in language of sufficient precision to be intelligible to the average lawyer. One of the merits of Austin, however we may differ from his views, is that we are never left in doubt as to his meaning. This failure to keep in touch with the concrete and their concentration on the 'inner or metaphysical aspect' of law is one of the forcible criticisms that Mr. Allen directs against the writings of the German historical school. He very pertinently remarks: 'This attitude leads to abstractions which convey the less meaning the more we seek to analyze them; for when we are dealing with law, a concrete institution of human society, we cannot be content with mere abstractions.' The same criticism may well be extended to the majority of Continental writers on the subject, and would seem to be applicable in all cases in which deductive methods are alone employed.

Mr. Allen's method is exactly the reverse. He makes an exhaustive examination of each of the sources of law, *i.e.*, as he explains, the chief materials which have gone to make up the body of the law, and of the processes by which law is made; and then states, in the form of summary, the conclusions suggested by his examination.

In an introductory chapter he discusses and makes clear, both on historical and scientific grounds, the fallacy involved in Austin's conception of law, concurring with the view so well expressed by Sir Frederick Pollock that 'Law is enforced by the State because it is law; it is not law merely because the State enforces it.'

In dealing with the nature and origin of Custom, Mr. Allen calls attention to an element which has received very little attention hitherto,

viz., the influence of Imitation. He quotes from M. Tarde's interesting work, *Les lois de l'imitation*, as to the operation of the imitative faculty, and then proceeds to give examples of its influence on medieval custom. The whole of this and the following section is full of shrewd observation and well-chosen illustrations, although perhaps undue space has been given to the dissection of the corpse of the *Volksgeist*.

An interesting feature of the section on Precedent is the discussion of the influence of precedent in Roman Law and an account of the authority of precedents in the French Courts.

The book gives evidence of finished scholarship and wide reading throughout, and is written in such style as to make reading, even of a law book, a pleasure. It should be read and re-read by every law student.

D. T. O.

Die Organisation der Rechtsgemeinschaft. Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts, und des Völkerrechts. Von DR. WALTHER BURCKHARDT, Professor der Rechte an der Universität Bern. Basel: Verlag Helbing & Lichtenhahn. 1927.

IN his *Organisation der Rechtsgemeinschaft*, dedicated to Rudolf Stammler, Dr. Burckhardt examines the legal order in its widest extent. He considers, from the jurist's viewpoint, the vast range of fundamental problems created by private, constitutional, criminal, and international laws in their relations one to another; he aims, in fact, to survey the whole field of law, holding that only by a comprehensive study of the entirety is it possible for the jurist to reach sound conclusions in regard to any one of its parts. 'Nur im Ganzen,' he declares, 'zeichnet sich die Bedeutung des Teiles.'

In approaching the enormous mass of legal materials falling within the compass of his research, Dr. Burckhardt differentiates three sets of problems—the problems of logic incident to the systematic ordering of legal principles and conceptions; the practical problems involved in the study of actual legal conditions; the problems created by the processes of legal evolution. But while he recognizes the fact that in an examination of the organization of the legal polity the scholar is faced by these three groups of problems, Dr. Burckhardt maintains that the sole task of the legal scientist is to study the materials at his disposal on lines of logic. 'Die logische Durcharbeitung der Rechtsstoffes,' he insists, 'ist die einzige Aufgabe der Rechtswissenschaft' (p. xi). He is aware, however, of the dangers which beset the path of the jurist who constructs his system and draws his general conclusions on the basis of logic. 'Versucht man,' he declares, 'allgemeingültige Schlüsse aus Begriffen zu ziehen, ohne sich gefragt zu haben, auf welche allgemeingültige Frage sie sich beziehen, oder aus allgemeingültigen Begriffen allgemeingültige Rechtssätze abzuleiten, so verfällt man in leere Scholastik' (p. ix).

Here, indeed, is the danger. The methods and subtilities of the medieval schools have lingered longer in the jurisprudential thought of Continental countries than in that of regions under the sway of English common law.

Even in quite recent times the abuse of dogmatic construction on the Continent has robbed many writings of a large part of their value; for too often modern jurists trained in the schools of the medieval civilians have produced only 'empty scholasticism.' Ihering saw the peril, and warned those of his contemporaries who assumed the completeness of the legal system, and were, in consequence, too much given to logical exaggeration. As he remarked in 1861, 'so wenig wie eine Dame heutzutage ohne Krinoline zu erscheinen vermag, so wenig ein moderner Civilist ohne Konstruktion' (*Scherz und Ernst in der Jurisprudenz* (8th ed.), p. 7). By making the extravagant and pedantic use of dogmatic construction an object of ridicule—the reader of Ihering can never forget his amusing passages on 'the heaven of juridical concepts'—the great Romanist did much to curtail the writing of abstractions which have no basis whatever in the law itself. In France, similarly, Gény and other leading jurists have been emphatic in protesting against the sterility of dialectics when carried to absurd lengths; and they have turned the main currents of French juridical thought into channels more nearly consonant with the actualities of legal life (see, e.g. the essays by French jurists in *L'Œuvre juridique de Raymond Saleilles*, Paris, 1914). 'English law,' as Vinogradoff has remarked in his comments on Law and Logic, 'so conspicuous for its common sense and attention to practical needs, is probably less liable than any other to have its rules perverted by an excess of abstract dialectics' (see *Historical Jurisprudence*, vol. i, pp. 3–27, at p. 24). Even in English law, however, general principles are sometimes carried by strict logic beyond the sphere in which they are reasonably applicable (see, e.g., Sir Frederick Pollock's comments on *Pinnel's Case*, in his *Principles of Contract*). In fact, medieval scholasticism has left some of its traces on English legal thought in our own time; for jurists have not always been mindful of the truth, stressed by Mr. Justice Holmes in his *Common Law*, that 'the life of the law has not been logic; it has been experience.' Those who write on the theory of the law ought never to forget that juridical speculation of the purely logical or dialectical type, a speculation which has none of its roots in the legal life of human society, is as dead, and as useless, as the figures in wax at Madame Tussaud's.

Dr. Burckhardt has succeeded in avoiding most of the perils incident to the logical treatment of his subject; and he has given us an analysis of the legal order which has in it much to interest and instruct the jurist, the legal philosopher, and the political scientist, and which will give at least a few hints to the legal historian who takes a wide view of the field of research that is open to him. Cast as it is in the mould of Continental thought, Dr. Burckhardt's book is hardly to be regarded as easy reading for lawyers who have been trained only in the school of the common law of England. A diligent study of its chapters will open to them, however, new veins of thought which will enrich their conceptions of the nature of law, their theories of the State, and their ideas on many other topics in juridical science. They will find that the author has brought private and public law into close relationship to each other, that he has considered both the sources of the law and the modes of its enforcement, that he has given constitutional problems a place of great prominence, and that, in the spirit of our times, he has devoted special attention to the international aspects of the legal order.

H. D. H.

Jural Relations. By ALBERT KOCOUREK, Professor of Law at Northwestern University, with an Introduction by JOHN H. WIGMORE, Dean of the Faculty of Law and Professor of Law at Northwestern University. Indianapolis: The Bobbs-Merrill Company. 1927.

PROFESSOR KOCOUREK, the author of this book, is a distinguished professor of jurisprudence at Northwestern University. As one of the editors of the *Modern Legal Philosophy Series* he has done notable work in spreading the knowledge of the philosophy of law, as taught on the Continent, in England and America. Perhaps there is no one living to-day who is so well qualified as a translator of foreign legal literature and who has done so much to raise the standard of this difficult and insufficiently appreciated form of work. His translation of Professor Gareis' *Introduction to the Science of Law* is a model of its kind.

In the present volume Professor Kocourek states his own views on what may be called formal or analytical jurisprudence. In his introduction to the book Professor Wigmore, after discussing the work of some of the earlier jurists, says, 'and now comes Kocourek, with a complete grasp of the entire problem and a real science of legal ideas.' It is not possible for the reviewer to agree with such unlimited praise. Fortunately for other students of jurisprudence, Professor Kocourek does not seem to have solved 'the entire problem.' It is possible, however, to say that this is an interesting and provocative book.

At the outset may we say, at the risk of being called narrow-minded by Professor Wigmore, that we doubt whether the particularly irritating terminology used in this book is essential to the correct understanding of legal ideas. Is it really necessary to speak as follows?

'Again, A has claims to corporal integrity against indeterminate persons. These relations are plurinary, *polypolic*, *heteradic*, *homomorphic*, *homotaxic*, and *homogeneous*. Likewise, according to the definition, they are *homologous*.

'Again, to put another case, if A and B have cross-claims against each other arising out of the same transaction, the relations are *heterologous*, *tetrapolic*, *dyadic*, *homadic*, *homomorphic*, *heterotaxic* and *homogeneous* (or *heterogeneous*, depending on the jural facts).' This much-vaunted legal terminology does not seem to be, as far as we can understand the book, of particular value in solving legal problems, for when such essential ideas as acts, persons and rights *in rem* are under discussion the author uses what is more or less straightforward English. It is unfortunate that in his chapter on Acts he did not attempt the invention of new words, for here, if anywhere, in the philosophy of law the present wording is insufficient. Professor Kocourek points out, as has been frequently done before, that the word 'act' is used in a number of different senses, but his solution of the problem is hardly satisfactory.

Perhaps the chapter with which we most disagree is Chapter XVII. In twelve-and-a-half pages the author destroys the established theory of what constitutes a legal person. His own interpretation is hardly as novel as he seems to suggest, for Salmond in his *Jurisprudence* had tentatively made the same point. He begins the chapter as follows: 'Is a human being a legal person?—The problem to be discussed is this: Is a human being a legal person (*persona*) or is such a being merely an object? In

other words, the question is: Is a human being a subject of legal relations or an object of legal relations? The conventional answer to this question given by European codes and by jurists is that a human being, unless a slave, is a legal person and that a human being is never an object, even in the sphere of family law.' He attempts to prove that physical human beings are the objects and not the subjects of the law. He does this by dealing in short paragraphs with slavery, the corporation sole, agency, the rights of unborn persons, duties and rights after death, and suicide. In less than fifteen lines he sums up the corporation sole and points out that 'this instance would appear to be conclusive' for the purpose of his argument. We wonder whether the author has ever read Maitland's Paper on the 'Corporation Sole,' and how he can square his views with the ideas expressed by that great master. Throughout the chapter considerable play is made with the word 'persona' and the phrase 'unus homo plures personas sustinet.' It is hardly necessary to point out that 'persona' as used here is not synonymous with the English word 'person.' Apparently, according to the author, 'person' is synonymous with 'capacity.' As the same human being may have unlimited capacities, so he is unlimited persons, some of which—or ought it to be 'who'—are ended with death, while others continue indefinitely. If a human being in one capacity commits a crime, which person goes to jail?

But whether we agree with his conclusions or not, we must be grateful to the author for having suggested a great number of interesting problems. At the present time it is no longer possible comfortably to accept Austin's analysis of legal terms as final. Professor Kocourek has shown that we must use a new method by which to solve these questions if we are to make any advance in legal science.

English History in Forms of Essays Political and Constitutional, 1066-1688. For the Use of Students. By D. C. COUSINS, M.A., of New College, Oxford. London: George Allen and Unwin, Ltd. 1927. (12s. 6d.)

MR. COUSINS' volume presents a methodical survey of English political and constitutional history from 1066 to 1688. It consists of a series of digests of answers to important questions in reference to each successive period; and it is to be regarded, in fact, as a 'chart' for the use of students. The author has adopted a method in which, as he remarks, 'the fullest advantage being taken of the printer's art, an attempt is made to stimulate exercise in orderly thought, by exposure to the eye of distinctions, comparisons, and subordination of lesser to larger movements, motives, influences, and results.' The book will certainly 'stimulate exercise in orderly thought' and prove useful to students who are preparing themselves for an examination. While the author bases his statements on some of the leading secondary authorities, such as the works of Gardiner, Anson, Dicey, Stubbs, and Maitland, he nowhere gives an indication of the precise passages in those writings upon which he relies. Nor has he made any reference to volumes in which the reader will find the original authorities, such as charters, cases, and statutes. Although, therefore, this absence of a scholarly apparatus deprives the book of scientific value

for scholars, beginners in English history may consult it with advantage, as a 'chart,' both before and after they have read the leading original and secondary authorities. If they use it as a *substitute* for wider reading, they will gain a very inadequate idea of English history in the periods from 1066 to 1688. In fact, the word 'Essays' in the title of the book is apt to mislead: a more accurate designation of the contents would be 'Lecture Notes.' The fact that these notes have been written by a scholar who has mastered his subject is what gives the book a value to students. It should be observed, moreover, that nearly one-half the pages in the book are left blank for the student's own notes. The author's notes occupy about one hundred and twenty pages.

H. D. H.

Equity Jurisprudence: A Selection of Cases with Brief Summaries of Principles. By SHERMAN STEELE, Loyola University School of Law, Chicago. New York: Prentice-Hall, Inc. 1927. (\$5.50.)

MR. STEELE'S collection contains about three hundred American cases on Equity arranged in eighteen chapters. The text of the law reports has been preserved, but with material omissions; while in some instances, indicated by brackets, the facts have been restated. Since the subject of Trusts usually constitutes a separate course in American law schools, there are in the collection no cases on Trusts. Each group of cases is prefaced by a brief editorial note with the object of putting the student in 'a questioning frame of mind' before he reads the cases themselves. In footnotes the editor draws attention to many American decisions which bear on the cases included in the collection.

Although Mr. Steele considers briefly certain features of English equity and presents a very few English cases, his book is based fundamentally, and indeed almost exclusively, on the equity of the American jurisdictions. While it will not compete, therefore, with the standard case-books on equity edited by the late James Barr Ames and Professor Walter Wheeler Cook, in which English authorities are fully considered, it should prove useful to American students and teachers as a supplementary volume of American authorities; and in some American law schools it will no doubt adequately serve the needs of students. The editor has exercised care in the selection of the cases; and he has succeeded in presenting a fairly comprehensive survey of the doctrines of equity as they are applied by the American Courts of the present day. Students in America who desire to found their study of equity on English as well as American cases will naturally use the standard collections already mentioned; and on the special subject of equitable relief against torts they will read, in addition to the cases in Mr. Steele's collection, Professor Chafee's case-book dealing with this topic.

While the almost complete absence of English authorities deprives Mr. Steele's book of value to a student in English law schools, legal teachers and writers in England will, on the other hand, be glad to possess this additional collection of American cases; for by its use they

will be able to compare with English equity many of the principles of equity as they are now applied by American Courts. For purposes of teaching equity to students in English law schools only those American case-books which include a large number of English cases are of practical value. Professor Scott's *Cases on Trusts* is a book of this character.

H. D. H.

The Estate of George Washington, Deceased. By EUGENE E. PRUSSING. With illustrations. Boston: Little, Brown, and Company. 1927.

THE reputation of George Washington has undergone an interesting series of changes, both during his life and since his death. When he was first elected President, he was incomparably the most important and popular man in the new United States. At the time of his second election he was intensely unpopular with a considerable portion of the population. After his death and for over a hundred years he was placed on a pedestal where he remained a legendary figure whom it was impious to criticize. At the beginning of the present century a reaction set in, and it became the correct intellectual style to describe him as a dull and unimaginative man who had been fortunate in his career. At the present time his reputation has been restored by the historians, and although it may be true to say that he was not a genius—at best a most unsatisfactory and indefinable word—he was unquestionably a man of great ability and strength of character.

The present book supports this view. Mr. Prussing, one of the most eminent scholars on the life and times of Washington, has republished the Will of George Washington with an analysis of all that it contains. He has described the property with which it dealt and has traced its history.

The Will has more than a sentimental interest, for it contains the famous clause: 'Upon the decease of my wife, it is my will and desire that all the slaves which I hold in my own right shall receive their freedom.' This showed that although Washington was a slave-holder he was opposed to that institution. There is also a second clause which is nearly as well known. In leaving his swords to his nephews, he said: 'These swords are accompanied with an injunction not to unsheathe them for the purpose of shedding blood, except it be for self-defence, or in defence of their Country and its rights; and in the latter case, to keep them unsheathed, and prefer falling with them in their hands to the relinquishment thereof.'

Although Washington was a layman, he drew the Will himself without legal assistance and, except for one unimportant error, it contained no mistakes. This is the more remarkable in that it is a lengthy document disposing of a large number of pieces of property. At the time of his death, Washington was probably the wealthiest man in the United States, and Mr. Prussing estimates his estate at over a million dollars. It is obvious, therefore, that Washington must have been a man of the greatest ability, for few laymen at the present time would be able to draw up a document such as is found in this Will.

Prize Law during the World War: A Study of the Jurisprudence of the Prize Courts, 1914-1924. By JAMES WILFORD GARNER, Ph.D., LL.D., Professor of Political Science in the University of Illinois. New York: The Macmillan Company. 1927. (25s.)

THIS work consists of a comparative analysis of the decisions given by the Prize Courts of all the belligerents which established them during the World War, a summary of their conclusions and an examination of their divergencies of opinion. It may be said to take its place between the exhaustive work of Professor Verzijl, of the University of Utrecht, entitled *Le droit des prises de la grande guerre*, which is an invaluable digest of Prize Court decisions amounting to 1,500 pages, and is essentially a work of reference; and the able summary of Mr. Colombos, entitled *A Treatise on the Law of Prize* (1926), and amounting to 352 pages. There is room for all these three books. Each fulfils a different purpose, and together they fill a gap in the literature of International Law, for though we have many books of reports of prize decisions we have no such comparative estimate of their contents as we now possess. Amongst the many matters dealt with by Professor Garner, the following may be mentioned as being of particular interest. In sections 126—138 he deals with the relation between International Law and Municipal Law, and the question which of these two it is that is administered in Prize Courts. In contrasting the Prize Courts of different countries in this respect, he describes the British doctrine that Prize Courts administer International Law and not Municipal Law, but are bound by legislative enactments though not by Orders in Council (*The Zamora*); the German doctrine that a Prize Court is bound to apply Municipal Law; the French and Italian doctrines to the same effect; and the Belgian doctrine, which holds that in the event of conflict between International and Municipal Law, a Prize Court should follow the former. In substance the British doctrine means that a Prize Court, though a municipal tribunal, administers International Law, because it is not customary for Parliament to legislate in matters of prize.

Another matter which has a particular interest in England is the policy adopted during the World War by different countries towards Hague Convention VI, relative to enemy ships found in port at the outbreak of war or entering a port while still ignorant of the outbreak of hostilities. Great Britain, in 1925, exercised her right of denouncing that Convention on the ground that its whole basis was an attempt to secure uniformity of practice which the World War had shown to be lacking. Professor Garner, in Chapter VII, describes the widely differing policies followed by different States in the World War. Another matter which gave rise to a good deal of controversy between belligerents and neutrals was the legitimacy of taking neutral vessels into port for the purpose of search instead of searching them at sea. It is interesting to note, in Professor Garner's sections 442 to 445, that it was not only Great Britain whose Prize Courts approved this practice, but that the French, German, and Italian Prize Courts and Councils approved the same policy.

There is probably no part of International Law where so much diversity of opinion and practice exists between different States as in the law of maritime warfare. Professor Garner has now provided us with what

will become the standard comparative examination of these divergencies. The book is accompanied by that same wealth of accurate documentation which we have come to recognize and value in his *International Law and the World War* and *Recent Developments in International Law*, and renders accessible the fruits of an exhaustive examination of the prize cases of thirteen States, amounting in all to some fifteen hundred decisions. Professor Garner deserves the warm thanks of international lawyers for the labour expended and for the high quality of the product.

A. D. McN.

Contracts in the Local Courts of Medieval England. By ROBERT L. HENRY, J.D. (Chicago), D.C.L. (Oxon.), Judge in the Mixed Courts, Alexandria, Egypt, formerly Professor of Law at the Universities of Louisiana, Illinois, North Dakota and Iowa. London: Longmans, Green & Co., Ltd. 1926. (16s.)

THE story of the development of contract law in England down to the beginning of the sixteenth century is to be traced in the records of the local Courts of boroughs, manors and fairs, rather than in the Registers of Writs, the Plea Rolls, or the Year Books. Dr. Henry has utilized the wealth of material furnished by the publications of the Selden Society, supplemented by other matter derived from a wide acquaintance with medieval records, to produce a most illuminating account of the procedure in the local Courts, more especially, as the title of the book indicates, with reference to cases involving contractual relations between the litigants. The chapters dealing with Pleading (I), Inquest Proof (III), and Covenants (VI) contain matter of particular interest showing the evolution of custom in relation to the enforcement of contracts.

We cannot agree with the inference drawn by the author from the provisions in customals allowing parties to amend their pleas that there was a general absence of formalism in the local Courts. It is true that the text of many of the customals 'favour liberty and the right of amendment.' But the introduction of such a rule in a customal appears to us to indicate an advance from a stage in which formalism was predominant. Early records of custom all point to this. In Chapter V, dealing with tallies, the author appears occasionally to confuse tallies with written obligations and bonds. This is the more surprising inasmuch as in several of the extracts quoted by him the tally is contrasted with a writing (see the quotation from Bereford C.J. on p. 140, *ad fin.*). The only warrant for this confusion that we have been able to trace appears to be an ambiguous use of the term in the passage from p. 34 of vol. ii of the Eyre of Kent, referred to in the footnote on p. 132. There are marks of want of care in the correction of the proofs of the work. Thus, on p. 12, for *Sir Edward*, read *Sir Steward*; on p. 132, for *Brown Avon*, read *Brown v. Anon.*; on p. 103, for *Debtinue*, read *Detinue*. The reference in footnote 2 on p. 92 to c. 33 of the Ipswich customal appears to be incorrect.

D. T. O.

Grundriss eines Bibliotheksrechts. VON DR. JUR. FRIEDRICH LIST, Privatdozent für Bibliothekswissenschaften einschliesslich des Bibliotheksrechts. Verlag von Emil Roth in Giessen. 1928.

THIS small volume by Dr. List, author of a well-known *Grundriss des Römischen Rechts*, is a systematic exposition of the rules and principles of German law in regard to libraries. Many German jurists have dealt with aspects of *Bibliotheksrecht*, or 'Library Law,' but Dr. List's book represents the first attempt which has ever been made to consolidate the results of previous studies and to give to this limited branch of German law a distinct character of its own. While designed chiefly for the use of librarians and civil servants concerned with the administration of libraries, the little treatise will also make an appeal to a wider circle of readers. Based on the author's practical experience in dealing with problems in 'the legal life of libraries' and on his careful research among the legal sources, it embodies a succinct statement of the law in which the theories and principles of jurisprudence have received adequate treatment. This jurisprudential aspect of the book will cause it to be read by legal theorists who have no interest in the actual administration of the *Bibliotheksrecht* of Germany. The legal personality of the library as an *Anstalt* naturally plays an important rôle in Dr. List's pages. *Bibliotheksrecht*, as a special aspect of the law, is considered, moreover, in its relation to several of the main branches of German public and private law, notably constitutional, administrative, civil, criminal, financial, and insurance law. While students of comparative law will regret the fact that Dr. List has made no reference to foreign law, they will find in his manual of the German law an excellent foundation for their future study of Library Laws on comparative lines.

H. D. H.

A History of the English Courts. Being a Fifth Edition of *A History of English Legal Institutions.* By A. T. CARTER, C.B.E., K.C. London: Butterworth & Co. 1927. (15s.)

DR. CARTER'S little book, which first appeared in 1899, has proved useful to gentlemen reading for the Bar examination. Although it was originally, and still is, based fundamentally upon secondary sources, it also bears the marks of the author's examination of some of the primary sources, such as statutes, charters, cases, and the like. The book under its new title will continue to fulfil the purpose of the author, for it will 'help those whose interest is more transitory' than that of the serious students who 'seek the sources.'

In its present form the book is much smaller than it was in 1910, when the last edition appeared. One now misses, for example, the chapters on 'early law and custom' and 'the King and early justice'; and one seeks in vain for the old appendix on 'the Halifax Gibbet-Law and the Court of the Savoy' and 'the Little Red Book of Bristol.' The gist of the old book, however, still remains; and in some particulars its text has been

revised. This revision has been hardly adequate; it has not resulted in bringing the book thoroughly up to date. To all seeming there is not, from cover to cover, any reference to Dr. Holdsworth's nine-volume *History of English Law*, the first volume of which deals with the history of the Courts; nor, apparently, has attention been drawn to the writings of Dr. Pollard and Dr. McIlwain and other recent contributions to the subject-matter of the book. Moreover, compression has led to the writing of some statements which, in their present form, are misleading; as, for example, the statement that 'after the Conquest the Customs "curtsied to great Kings" and went, leaving in their place, the Custom of the King's Court, or the Common Law' (p. 7). This statement is no doubt true; but without some explanation it will hardly convey to the student the point that the survival of Anglo-Saxon custom, either in local law or in the common law, is one of the marked features of the legal history of post-Conquest days. In some parts of the book a just balance has not been maintained; as, for example, in the passage on 'Law and Fact' (p. 141). Considering the importance of this distinction in the English system eight lines are in themselves hardly sufficient; but when four of them are devoted to the Decretals the student of the history of English Courts, even the student whose interest is purely 'transitory,' will hardly carry away much that will be of service to him. The final chapter, the one on 'The Jew,' seems sadly out of place. Since it deals with medieval times one might naturally expect to find it in an earlier part of the book.

The little book has defects other than those mentioned; but it also has features which make it a serviceable compendium. It contains much solid matter presented in a succinct and readable style; and it should encourage at least a few students, when they are reading for the Bar, to glance at the pages of Maitland and other masters of English legal history.

H. D. H.

Mortimer on the Law and Practice of the Probate Division (with appendices containing rules, etc., and precedents of pleading). Second edition, by the AUTHOR and H. H. H. COATES, of the Principal Probate Registry. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1927. (£2 10s.)

THIS volume is the product of a happy collaboration between two Cambridge lawyers. It is primarily a practitioners' book, and its utility in that sphere is guaranteed by the experience in the Principal Probate Registry of Mr. Coates, who has brought up to date those parts which deal with the practice of the Court.

But it is more than this. Part I, revised by the author himself, Mr. Clifford Mortimer, constitutes a well-written textbook on the making and revocation of wills, the appointment of executors, probate and grants of administration. We regret that the work should not have been published in two volumes, so that Part I might be purchased separately by students not concerned for the moment with the details of practice. Perhaps the author is too modest to recognize the merit of his own work, for

he concludes his preface with the epilogue of Henry Swinburne, the sixteenth century author of the earliest treatise in the English language on the subject of testaments. 'Thus for thy love (loving Country-man) have I delivered unto the view of thy judgement the picture of my conceit concerning testaments: which if thou shalt behold sharply, then I fear strongly, notwithstanding my late Corrections and Additions, that yet still thou wilt espie, instead of just proportion, lameness, or want of some notable members; and instead of delectable beauty, deformity, or spots of foul and loathsome errorrs. Wherefore as at the first I did earnestly entreat for favour, so now in the end I do humbly beg for pardon.'

H. A. H.

Coote's Treatise on the Law of Mortgages. Ninth edition, by R. L. RAMSBOTHAM, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1927. Two volumes. (£4 10s.)

It is inevitable that works like that of Coote should be edited and re-edited, because the labour of producing original treatises on a similar scale is so prodigious that lawyers are loth to undertake it, especially if they have no assurance that when their task is completed they will find a publisher. Editors therefore like Mr. Ramsbotham, who assume the tedious task of bringing such necessary compilations up to date, deserve the grateful thanks of the profession. A reviewer must not, however, be thought lacking in such gratitude if he does not say that the result is a work of art, for form and style are obviously incompatible with such patchwork construction.

We regret that the editor did not decide to rewrite Part I. For these 130 pages form an unprepossessing introduction, and there is no apparent principle upon which the matter contained in them is collected. One does not understand for instance why the short chapter headed 'Mortgages of Stock' appears where it does when there is another section on the same subject in Part II, 'The Subject-matter of Mortgages.' And it is surely misleading, in view of the legislation of 1925, to begin a chapter on the modes by which an equitable mortgage may be created with the statement that an equitable mortgage may be made by a formal mortgage of the equity of redemption in property when the legal estate is vested in a prior mortgagee.

But a treatise of this sort must be judged not as literature or as a work of exposition, but as a work of reference to be used by persons who already know their way about the subject. In this character the ninth edition will continue to hold the place of its predecessors among the tools of the profession.

H. A. H.

Theobald on the Law of Wills. Eighth edition (with a short collection of precedents), by J. I. STIRLING, Barrister-at-Law. London: Stevens & Sons, Ltd. 1927. (£2 10s.)

SIR HENRY THEOBALD, formerly Fellow of Wadham College, Oxford, is a great lawyer and his treatise on the law of wills is a great book. Admirable also, by the way, is his little book of 1902 on the law of land, a book too often forgotten. Unfortunately Sir Henry has been unable to take part in the preparation of the eighth edition of his work on wills, which succeeds the seventh edition after an interval of twenty years.

Interested as we are in law books as the expression of legal scholarship rather than in their utilitarian qualities, we regret that Sir Henry's classic should appear with at least a hundred pages of new matter added by the hand of another, distinguishable only by a comparison of the texts of the seventh and eighth editions. We should have preferred a supplementary volume of commentary on the original text in the light of subsequent cases and legislation.

But publishers crack the whip and never fail to find lawyers patient of the yoke. And perhaps the legal profession as a whole is glad to have it so. Lawyers want to find authority quickly, and have little use for sentiment.

If *Theobald on Wills* was to be edited in the approved style no better choice of editor could have been made than that of Mr. Stirling, and we predict that the book will have a very large sale. It will, of course, be used mainly by practitioners, but it should not be wholly neglected by students. Though too expensive for purchase by them, and unsuitable in form for continuous reading, there are certain parts of it which good students preparing for a LL.B. degree or for the Solicitors' Honours Examination will do well to consult. The first eighty-eight pages, dealing with the making and revoking of wills and the effect of probate, will be found most useful, provided that they are read with the *Law Reports* at hand.

There are also certain parts which deal with topics which one would not necessarily find in a textbook on wills. There are the very useful chapters on rights between tenant for life and remainderman (chap. xliii), on conditions precedent and vesting (chap. xliv), and on conditions subsequent (chap. xlvi). Students may advantageously use the account given of these topics as a supplement to *Cheshire's Law of Real Property*. To the teacher of the law of property the whole book is indispensable.

H. A. H.

Wolstenholme and Cherry's Conveyancing Statutes. Eleventh edition, by SIR BENJAMIN LENNARD CHERRY, LL.B., JOHN CHADWICK, M.A., LL.B., and DAVID HUGHES PARRY, M.A., LL.M., Barristers-at-Law. Volume II. London: Stevens & Sons, Ltd. 1927. (£4 for the two volumes.)

IN this second volume the principal author has turned from warning the legal profession that it would be on its trial and has concentrated his whole attention on equipping the legal profession to cope with its trials.

More time has been taken over the preparation of this volume, and we rejoice to see that it is almost free of those signs of haste which marred its predecessor. There are no less than seven pages of *addenda et corrigenda* referring to Volume I: but it is only fair to add that the majority of them are caused by the Law of Property (Amendment) Act, 1926, and by decisions subsequent to 1925.

We welcome the addition of Mr. Hughes Parry's name to those of Sir Benjamin Cherry and Mr. Chadwick on the title page. The present volume comprises the text (with copious notes and useful introductory summaries) of the Settled Land Act, 1925, the unrepealed sections of the Trustee Act, 1888, and the Trust Investment Act, 1889, the Trustee Act, 1925, the Administration of Estates Act, 1925, with appropriate sections of the Judicature (Consolidation) Act, 1925, the Law of Property (Amendment) Act, 1926, and the Legitimacy Act, 1926. In addition there are fourteen appendices containing annotated texts of all the material rules and regulations hitherto published, and such items as the General Conditions of 1925, the statutory will forms, etc. The two volumes make up a real property lawyer's *vade-mecum*, save that the entire field of the Land Registration Act, 1925, and its Rules has been very properly left to Sir Charles Fortescue-Brickdale and Mr. Stewart-Wallace.

The commentaries are very well done, except that we again complain of occasional inadequacy in the cross references. Section 31, sub-section 3 of the Trustee Act, 1925, ought to have a fuller note to explain in what cases a contingent gift carries the intermediate income, and the former law laid down in *Re Averill* [1898] 1 Ch. 523.

The question (subsequently dealt with on different lines in *Re Bridgett and Hayes' Contract* [1928] 1 Ch. 163, and *In the Estates of Gibbings* [1928] P. 28) as to the applicability of section 22, sub-section 1 of the Administration of Estates Act to the case where a settlement comes to an end *eo instanti* with the death of the tenant for life is not well treated in the notes to that section. Two alternative and irreconcilable views are given, and the reader is left to his choice between them.

H. E. S.

Palmer's Company Precedents. Part I, General Forms, by A. F. TOPHAM, K.C., and A. R. TAYLOUR. (£3 10s.) Part II, Winding-up, by A. F. TOPHAM, K.C., assisted by H. W. PARRY. (£3.) Part III, Debentures, by A. F. TOPHAM, K.C., assisted by E. RIVIERE and A. R. TAYLOUR. (£2 net.) Thirteenth edition. 1927. Stevens & Sons, Ltd.

It goes without saying that this work has long been indispensable to every Chancery practitioner. Under Mr. Topham's editorship it has lost nothing of its authority, and but little of its original classic form. The accurate incorporation from time to time of current case law with the necessary notes and modifications based thereon leaves the book still absolutely reliable for the details of company practice. In this edition Mr. Topham has the advantage of co-operation with Messrs. Taylor, Evelyn Riviere and Wynn Parry. The volumes are, we think, better

printed and certainly better bound than formerly. Having regard to their ponderous size this is a decided improvement. So also is the more equal distribution between the three parts of the bulk of the material—made possible by the transfer from Volume I of the chapter on Reconstruction to Volume II and of that on Banking and Advance Securities to Volume III.

The principal changes in the forms are attributable to the property legislation of 1925. We apprehend that the proposed legislation regarding companies will not materialize for some time yet to come. If and when it does, it will principally affect Volume I of the work before us, and we are promised a small supplementary volume, which should be adequate for the occasion.

H. E. S.

Underhill and Strahan's Principles of the Interpretation of Wills and Settlements. Third edition, by J. B. RICHARDSON, M.A., LL.B., of the Middle Temple, Barrister-at-Law, Lecturer in Real Property and Equity in the University of London, Examiner in Real Property and Equity to the Inns of Court. London: Butterworth & Co., Ltd. 1927. (17s. 6d.)

THE second edition of this most useful work was published in 1906, so that the task of preparing a new edition must have been a very onerous one. In our opinion, Mr. Richardson has accomplished this task admirably. The work gives evidence of careful revision throughout and furnishes a ready reference book for students and practitioners on questions involving the construction of documents. Owing to the methodical treatment and better arrangement of the subject-matter, most students will probably prefer this work to the well-known treatise of the late Mr. Vaughan Hawkins on the Construction of Wills in approaching the subject for the first time.

The great changes made by the legislation of 1925 have had a very limited effect on rules of construction, and as the old rules still apply to instruments coming into operation before 1926, the learned editor has very wisely not interfered with the original scheme of the book but has followed the plan of setting out both the old and the new rules in the appropriate article. A good example of this method of treatment may be seen in the discussion of the *Rule in Wild's Case* (Art. 42), on pp. 172—174. Mr. Richardson has added a useful note on the general effect of the Acts of 1925 in relation to the subject-matter of the work (pp. 124—128), and an Appendix summarizing the transitional provisions concerning wills and settlements contained in Schedule I of the Law of Property Act, 1925, and Schedule II of the Settled Land Act, 1925.

D. T. O.

Ringwood's Principles of Bankruptcy. Fifteenth edition, by ALMA ROPER, of the Middle Temple, Barrister-at-Law, Editor of 'Bankruptcy and Company Reports,' with the assistance of G. L. HAGGEN, M.A., B.C.L., of the Inner Temple and North-Eastern Circuit, Barrister-at-Law, Lecturer in Law in the University of Leeds. London: Sweet & Maxwell, Ltd. 1927. (£1 2s. 6d.)

THIS work, originally founded on a course of lectures delivered by the author as lecturer to the Incorporated Law Society, has for half a century maintained its position as probably the best textbook for students of the principles of bankruptcy law. It is to be regretted that in recent editions the editors have thought it desirable, apparently with a view to adapting the work to practical requirements, to include a number of Appendices containing the texts of Acts, Rules and Forms which nearly double its bulk. These Appendices cover 330 pages. As the editor states in his Preface, the work is primarily and essentially intended for students, and it is, in our opinion, an error of judgment to attempt to make the book a possible substitute for practical works like Chalmers and Hough's *Bankruptcy Acts* or Williams's *Law and Practice of Bankruptcy*. Apart from this criticism, we think the present edition maintains the well-established reputation of its predecessors. We notice one or two omissions which, however, are not attributable to the present editor. No mention is made of *Nichols to Nixey* (1885) 29 Ch. D. 1005, nor of *Re Rose* [1904] 2 Ch. 348, both cases of some importance on the subject of the powers of the trustee in bankruptcy with reference to powers of appointment vested in the bankrupt. On p. 182, in dealing with proof by a wife in the husband's bankruptcy, reference should have been made to *Re Slade* [1921] 1 Ch. 160.

D. T. O.

A Digest of the Law of Bills of Exchange. By SIR M. D. CHALMERS, K.C.B., C.S.I. Ninth edition. London: Stevens & Sons, Ltd. 1927. (Price 25s.)

THIS edition of the work under review is unhappily the last which the profession will ever receive from the hands of the learned author himself. The death of Sir Mackenzie Chalmers just before Christmas, 1927, ended a career of amazing industry and versatility in the public service. It would be out of place to remark here upon his judicial and administrative activities; it is sufficient to say that probably the most enduring of his achievements is to be found in the draftsmanship of such enactments as the Bills of Exchange Acts, 1882 and 1906 and the Sale of Goods Act, 1893. Those statutes will always stand out from their contemporaries as models of common law codification.

Nor did Chalmers' legal services stop with the passing of his bills into law. He published commentaries which came to be regarded as the authoritative expositions of the several statutes in question, commentaries which were moreover so detached and judicious as to be entirely free of

the suspicion that the father had shown undue partiality to his own children. He lived to publish ten editions of his *Sale of Goods Act* and nine of his *Digest of the Law of Bills of Exchange and Negotiable Securities*—a fact which is of itself sufficient to testify their value.

The present edition of the work on *Bills of Exchange* calls for little comment, since no new legislation has affected the previous edition of 1919. The case law is brought up to date and includes the two important decisions *McDonald & Co. v. Nash & Co.* [1924] A. C. 625 and *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.* [1926] A. C. 670. The learned author has referred to the latter case on no fewer than nine occasions: he has not, however, at any point in the work given us the benefit of his criticisms upon it, which, having regard to the controversy provoked by the decision, is a loss to his readers.

This edition makes frequent references to the *Negotiable Instruments Law*, drafted by the United States Commissioners on Uniform State Laws, and now adopted by the great majority of states in the union. That law is the very direct offspring of the British Act of 1882, and consequently the decisions of the American Courts in interpreting it are of considerable value to English practitioners. Sir Mackenzie has not hesitated accordingly to make a judicious use of them. Perhaps in the fulness of time it will appear that one of his last inspirations has furthered a desire which he was known to have at heart, namely, the assimilation of the rules prevailing in various common law jurisdictions in regard to negotiable instruments.

H. E. S.

Aircraft and Commerce in War. By J. M. SPAIGHT. 1926.
London: Longmans, Green & Co.

THIS little book is, in the words of the author, 'an appeal to every citizen who takes an intelligent interest in the problem of imperial defence.' Dr. Spaight is recognized as a writer of authority on air power and war rights, and in the space of 100 pages he has put forward his views in a condensed form indicating the important effects which the advent of air power may be expected to have in any future war. In a very clear and straightforward way the author speaks of the consequences of economic pressure as a weapon of war, and in so doing he examines the methods pursued by Great Britain and the Allies in the late war. The importance of war on commerce as a part of the combined pressure by sea and land forces was emphasized in the years 1914 to 1918 in a marked degree. The conflicts with neutrals and the uncertainties of many of the rules of naval warfare are discussed with vigour; and the author has, in a few pages, laid his finger on some of the really crucial difficulties in a manner which indicates the thoroughness of his acquaintance with the subject. Every student of international law will find it worth his while to study his two chapters on 'The rights of interference with commerce,' and 'The trade restricting agreements of the Great War.' But the main point which the author makes is that Great Britain, who already has sea-power at her call, 'must add air-power; air-power sufficient after the other essential needs of air defence have been met, to protect from air attack the shipping upon which her very life depends.'

A. P. H.

Selected Articles on Criminal Justice. Compiled by JAMES P. Kirby. 1926. The H. W. Wilson Co. (\$2.40.)

A NUMBER of articles about the administration—or lack of administration—of criminal justice in the United States of America.

The whole system of criminal justice seems to leave itself remarkably open to attack. Relying solely on the information obtained from these articles, one gets the impression of corrupt police, incompetent judges, and objectless punishments.

Of the police, one typical illustration is sufficient. A policeman was discharged from the force, after a private inquiry by police officials. No reasons were made public; but inquiry brought out that this policeman, at different times previously, had been indicted for murder, perjury, and extortion; so it may be presumed that the offence for which he was discharged must have been serious. The real defect is that the police force is a political force, under political control; which means immunity to political friends, and abuse of other offenders. The judges and public prosecutors are political officials; they are not appointed particularly for legal ability, and they can neither judge a case impartially nor hold their own against professional specialists in criminal pleading. As for the gaols, one wonders, when reading the articles about them, whether one has not wandered into John Howard's report on the prisons of his day, with an appendix on attempted prison reform of the early nineteenth century. To quote the report on one gaol: 'The cells are without light, natural or artificial. They are exactly alike—eight feet long, four feet wide, and seven feet high, with a barred door two feet in width. Each contains a cot two feet wide. They contain buckets for toilet purposes, not always emptied daily. Each Saturday, at noon, the prisoners are locked in their cells, where they remain till Monday; and during the remainder of the week they are similarly confined about twelve hours out of the twenty-four. In the one hundred and three hours spent in this fashion each week, a prisoner can do no reading, and engage in no occupation whatever.' This report is a rather mild selection from pages of reports by gaol inspectors.

There seems to be an honest effort being made by a few people to find some solution, some method of bettering conditions and enforcing the law. These articles are an attempt to express that effort, and to bring a realization of conditions as they are to the minds of the people. We suggest that the solution seems to lie, firstly, in getting the administration of criminal justice clear of politics; secondly, in cleaning up the existing state of things; and thirdly, in studying the individual offender, so that his punishment may have some relation—not to his offence—but to his character, with the object of finding out what is best to be done with him for his own good and the good of society. As a step towards these ends we wish success, and a large circulation, to this book.

H. B.

A Manual of Company Law. By PAHLAPING B. ADVANI, M.A., LL.B., Pleader of the Court of the Judicial Commissioner of Sind; Professor of Company Law and Law of Torts, Sind Collegiate Board's Law College, Karachi. With a Foreword by RUPCHAND BILARAM, B.A., LL.B., Additional Judicial Commissioner of Sind. Karachi. 1927. (Rs. 3.)

THE author's aim is to present the principles of company law, as applied in India, in their 'natural or logical sequence,' and the work is mainly an explanatory commentary on the provisions of the Indian Companies Act VII of 1913. As Mr. Bilaram remarks in his Foreword, it will no doubt 'meet the requirements particularly of the persons for whom it is intended.' There is a comparative table showing the correspondence between the Indian and English Companies Acts which should prove most useful to students of the subject.

There is a lamentable want of precision in the statement of many of the statutory provisions, but as the work apparently was prepared for use in connexion with lectures delivered by the author his propositions were no doubt supplemented by oral explanations. We give a few examples: 'The subscribers of a memorandum may choose any name for the company but the use of certain names is prohibited by the Act' (p. 11). 'Every member is entitled at his request to get a copy of the memorandum (and articles, if any) on payment of the maximum charge of one rupee. (For penalty, see Appendix D, No. 1)' (p. 13). Presumably there will be very few requests for the supply of these documents. 'Articles inconsistent with the Act or the memorandum of a company are inoperative and void *unless they are contained in Table A, which has statutory authority*' (p. 14). The italics are our own.

If a new edition is called for, the text should be carefully revised.

D. T. O.

Law Office Management. By DWIGHT G. McCARTY, M.A., LL.B., Member of Iowa Bar. New York City: Prentice-Hall, Inc. 1927. (\$5.)

THIS book is a peculiar combination of common sense and psychology, the latter being one of the author's favourite words. There is some excellent practical advice on the use of office machinery, such as filing cabinets, office records, etc., which would prove useful to a busy English solicitor. The pages dealing with more general advice are full of amusing instances. On page 215 the author discusses how to close a consultation with the maximum of efficiency coupled with the minimum of insult to the visitor. 'One keen business man brings his interview to a close by *abruptly changing the subject*. He refers to the weather, and asks if it is getting colder. When the caller answers the question, the opening is ripe to rise and terminate the interview and dismiss the visitor. The germ of this method has sound psychological value and can be utilized to advantage in

every law office.' We suppose if the visitor does not take the hint about the cold weather, that the next remark is to say that you will soon make it hot for him.

On page 346 there is a pretty instance of how business can be combined with religion to the advantage of both.

'Social Intercourse.—Much has been written about the advisability of being a "good mixer." The good mixer is not always the good lawyer. Ability will build up a practice more surely than good fellowship. It is for each to decide for himself how far it is desirable to join clubs, lodges, and other associations. Politics present a broad field for the talents of the lawyer, provided they are not allowed to go to the length of interfering with business. Most attorneys appreciate the importance of church membership in deepening the faith and strengthening the principles of religion in their daily practice.' Is it possible that Mr. McCarty wrote this paragraph with his tongue in his cheek?

The Problem of a World Court. By DAVID JAYNE HILL.
London: Longmans, Green & Co. (Price 7s. 6d.)

DR. HILL's book is the standard exposition of the case of that party in the United States of America who oppose American adherence to the Permanent Court of International Justice. With the domestic political issue it would be impertinent for an outsider to meddle. But we are a little surprised that an American should pour such contempt upon the ordinary functions of the Court or of Courts in general.

In a number of the United States the Courts have power to give advisory opinions, and we have never heard an inhabitant of Great Britain advocate the abolition of the advisory functions of the Privy Council. If the United States declines to make use of the Permanent Court unless and until it is shorn of its power to give advisory functions, she may at once give up all hope of resort to it. The countries which belong to the Court and make use of it regard this power as of the highest value—witness the fifteen or more advisory opinions compared with ten judgments in the last five years. Dr. Hill, after citing Art. 14 of the Covenant, adds: 'Having no power to do anything of itself, it may "also" give a quasi-judicial approval to what the Council or the Assembly wishes to do or cause to be done!' This is the language of party controversy. The suggestion that the Court is the tool of the Assembly or the Council is grotesque. Why did the Court decline to give an opinion in the *Eastern Carelia Case*?

Throughout the book is implicit, the curious suggestion that the members of the League have filched an American idea—that of a World Court—and are now unreasonably preventing the United States from sharing in the fruits of it.

A. D. McN.

The German Law on Private Insurance. By DR. ALFRED SIEVEKING, of Hamburg. London: Stevens & Sons, Ltd. 1927. (12s. 6d.)

THE main body of this work consists of an English translation of the three leading German statutes dealing with private insurance and of the General Rules of Marine Insurance, 1919, the last being a body of consensual rules adopted by German underwriters for incorporation into policies of insurance. There is also a useful body of notes. Dr. Sieveking originally undertook the task of translating these codes as part of the more ambitious scheme projected by Professor Bruck of Hamburg University for the publication in simultaneous English and German editions of the laws on private insurance of the whole world. If and when the latter scheme reaches completion, the present work will presumably be absorbed into it.

To the English lawyer undoubtedly the most interesting portion of the book is that which contains the translation of the Insurance Section of the Commercial Code of 1861. This translation, modelled as it is closely on the language of the English Marine Insurance Act of 1906, is certainly an advance on any other translation of these provisions which have come to our notice. We can heartily recommend the book as a useful addition to the science of comparative law.

W. L. M.

Marine Insurance: The Doctrine of Proximate Cause and Insurance against War Risks at Sea. By the HON. MR. JUSTICE WRIGHT. London: The Solicitors' Law Stationery Society, Ltd. 1927. (Price 2s. 6d.)

THIS booklet contains a reprint from the *Solicitors' Journal* of two lectures delivered by Wright J. to the students of the London School of Economics and Political Science. In the first lecture an analysis is made of the meaning of the *causa proxima* rule in marine insurance. From an interesting survey of the authorities the principle is deduced that the rule contemplates 'a material event or physical act directly affecting the thing insured' and disregards 'causes in which the state of mind is an essential element, except in the anomalous case of barratry.' The learned author fully realizes that the contention which he himself persuaded the majority of the House of Lords to adopt in *Samuel v. Dumas* [1924] A. C. 431 (the scuttling case) raises certain difficulties in the way of this view.

The second lecture is chiefly occupied with a review of the protracted litigation which ensued between marine and war underwriters arising out of losses of vessels at sea during the Great War. The close of the war came too soon for the consequences of some of the later decisions to be fully appreciated.

Both lectures are so packed with apposite illustration and disclose, as might be expected, such an intimate knowledge of the case law involved that they fully deserve to be rescued from the comparative obscurity involved in publication in the files of a weekly periodical.

W. L. M.

A Concise Law Dictionary for Students and Practitioners with Summaries of the Leading Cases and a Translation of Roman Law Terms and Latin Maxims. By P. G. OSBORN, LL.B., of University College, London, of Gray's Inn, Barrister-at-Law and of the Inland Revenue Department. London: Sweet & Maxwell, Ltd. 1927. (15s.)

IN the preface the author of this dictionary says: 'To write a law book without cases is like building a house without foundations. This dictionary is unique in my experience in giving a summary of the leading cases in all the important branches of the law. The principle laid down or exemplified by the case is stated together, where necessary, with a brief statement of the fact, and the decision.' We doubt whether this inclusion of leading cases is a matter for congratulation. To try to include in 306 pages a satisfactory dictionary of legal terms, a collection of leading cases, and a translation of Latin maxims is to attempt the impossible. As a result, this book is neither fish, nor flesh, nor good red herring. The cases seem to have been chosen on an entirely arbitrary principle. Thus, under the heading of Bills of Exchange, they are: *Master v. Miller*; *Miller v. Race*; *Ex p. Waring*; *Bank of England v. Vagliano*; *Embiricos v. Anglo-Austrian Bank*. We have tried, without success, to find any basis on which these particular cases were chosen to the exclusion of the more important ones. The author devotes eleven lines to the *Vagliano Case*, which is out of all proportion to its practical importance in the law. Moreover, such a necessarily inadequate summary would be both useless and dangerous to anyone attempting to understand the principles on which this case was decided.

We think the inclusion of these cases is particularly unfortunate, as Mr. Osborn seems qualified to write an adequate short dictionary of legal terms. Where he has confined himself to definitions his work is excellent, and many of his definitions are better than those found in the longer and standard dictionaries.

Suretyship: Its Origin and History in Outline. By T. HEWITSON, LL.D. Law Book Company of Australasia, Ltd. Sweet & Maxwell, Ltd. 1927. (18s. net.)

THE author divides his subject-matter into four parts—its history in the East, in the West, in Britain and Ireland, and the effect of equity in the development of suretyship. The scheme is therefore an ambitious one, perhaps too ambitious. It would have been a heavy task if it had been limited to Anglo-American law and there it is rather surprising to find such scanty treatment of the Year Books. Ashe's *Promptuarie* has forty captions under the heading 'Surety.' As to other systems of law, we might call the author's attention to Mr. H. A. de Colyar's article in the *Journal of Comparative Legislation*, 1904—1905, vol. vi, pp. 46—67. Perhaps Dr. Hewitson suffered from inaccessibility to a good law library, but surely works like Liebermann's *Gesetze der Angelsachsen*, the current

edition of Holdsworth's *History of English Law*, and Buckland's *Text-Book of Roman Law* were available. Incidentally, the proof reading of the pages on Roman law seems to have been hasty.

P. H. W.

A Compendium of the Law of Torts. By SIR HUGH FRASER.
Eleventh edition, by ROLAND BURROWS, M.A., LL.D.
Sweet & Maxwell, Ltd. 1927. (12s. 6d. net.)

EVEN before the untimely death of the learned author of this well-known book, his promotion to the Bench had necessitated the transfer of its eleventh edition to someone else, and this passed to the capable and experienced hands of Dr. Burrows. There is little need to say more, for the work has been in constant use by a generation of Bar students, and as a compendium is excellent. Is it still too late to substitute 'strict liability' for the phrase that a man 'acts at his peril' in some torts? Or to indicate to the student that negligence has the two entirely different meanings of an independent tort and of a state of mind?

P. H. W.

Odgers on the Common Law of England. Third edition. By
ROLAND BURROWS, M.A., LL.D. Sweet & Maxwell, Ltd.
1927. Two vols. (£2 10s. net.)

THIS is another book well adopted to the needs of the Bar examinations candidate. In its origin it was Broom's *Commentaries on the Common Law*. This was altered in arrangement and substance by the late Dr. Blake Odgers, and Dr. Burrows has confined himself to the correction of slight errors and to bringing the matter up to date. This disarms any criticism on the plan of the book, which is peculiar in parts and not always convincing. Thus, it is curious to find a purely statutory product like old age pensions included in any scheme of the common law, but it is still more curious to find it described under 'Rights common to all.' The learned editor seems to have included references to most of the recent cases likely to be serviceable to the student. Some of them might perhaps have been given in greater detail, even at the cost of jettison of other matter, for Dr. Burrows' reputation would have made us welcome his own rendering of the effect of new decisions quite as much as it would have justified reliance on his discretion in the excision of matter which is not notably helpful to the beginner in law.

P. H. W.

The Justice's Note-Book. By the late W. KNOX WIGRAM, J.P. Eleventh edition, by JOHN EDWIN MITCHELL, J.P. and JOSEPH SMITH. Stevens & Sons, Ltd. 1927. (12s. 6d. net.)

ONE of the first additions to the reviewer's law library on his joining the body of magistrates was this useful volume. It struck him as a book helpful not merely to the justice of the peace who has some professional qualification, but as particularly welcome to lay occupants of the Bench, who may be pardoned for flinching at the technicality and expense of Stone or Paley, excellent as those treatises are. The editors of the present edition have taken account of the new statutes since 1923, which go to swell the *confusa multitudo* of enactments dealing with, or affecting, summary jurisdiction, or magisterial administration. Adopted children, diseased animals, and unlicensed moneylenders are some of the topics which the Legislature has recently commended to the attention of justices. The editors have done their task well.

P. H. W.

Matrimonial Jurisdiction of Justices. By ALBERT LIECK and A. C. L. MORRISON. Solicitors' Law Stationery Society, Ltd. 1926. (12s. 6d. net.)

MR. LIECK is chief clerk of the Marlborough Street Police Court, Mr. Morrison of the Lambeth Police Court. Their experience has been put to good practical use in the production of this monograph on a branch of magisterial jurisdiction which, within our own knowledge, is extremely common in its exercise and usually difficult in its application. It may seem incredible to the layman that there are some seventy statutes dealing directly or indirectly with the authority of justices in matrimonial disputes. A justice might have an intimate acquaintance with every one of them and yet make a lamentable mess of most of the cases before him if he did not administer the law with humanity and common sense. Both those qualities are notable in the authors' preface which ought to be read by every layman on his accession to the Bench.

P. H. W.

The Criminal Justice Acts. By ALBERT LIECK and A. C. L. MORRISON. Second edition. Stevens & Sons, Ltd. 1927. (12s. 6d. net.)

It is only a little while ago that we had the pleasure of congratulating in a different periodical the authors of this book on another work of theirs. This is concerned principally with the Acts of 1914, 1925, and 1926, which are taken section by section with comments where such are needed. It is not a method of exposition which in general we favour, but is probably the

best suited to those who wish to make rapid use of the Acts in a criminal Court. Moreover, the Acts deal with such a *farrago* of matters that any scientific approach to their contents is not easy. Not the least valuable part of the book is Sir A. H. Bodkin's foreword to the first edition.

P. H. W.

Selected Articles on Commercial Arbitration. Compiled and edited by DANIEL BLOMFIELD, A.B., LL.B. New York: The H. W. Wilson Company. London: Sir Isaac Pitman & Sons, Ltd. 1927. (\$2.40.)

MR. BLOMFIELD has industriously compiled a considerable bulk of information as to the practice and growth of commercial arbitration in America, mostly culled from the pages of current periodicals. Many of the articles collated are of purely ephemeral interest, but scattered throughout the book there are citations from American decisions and statutes which may be of interest to the English lawyer. The comments upon the English decisions are at times unreliable. The work is not and does not profess to be a textbook upon the law of commercial arbitration.

W. L. M.

A Century of Jurisprudence. Professor J. E. G. DE MONTMORENCY, Quain Professor of Comparative Law. London: University of London Press, Ltd. (1s.)

WE find some difficulty in determining what the Quain Professor means by 'Jurisprudence,' for his address contains no reference to Maine, Markby, Maitland, Salmond, Vinogradoff, or to the Americans—Holmes, Terry, and Pound. Apparently Bentham and Austin were the only jurists of note during the past century. The address also contains a list of writers—some eminent and some of doubtful authority—on Roman law. The learned writer divides jurisprudence into the medieval period before 1828 and the modern period since that date. He also discusses the nature of customary law, and concludes his address with an eloquent appeal that the Universities make the study of law 'an essential and necessary part of the degree in arts.'

A Study in Public Finance. By A. C. PIGOU, M.A. London: Macmillan & Co. 1928. (16s.)

FOR those who are concerned more particularly with the future development of legislation or with the principles which should govern the immediate remodelling of the law, various sections of special interest are

to be found in Professor Pigou's study. In Part II of the work he deals with the respective merits of the 'principle of equal sacrifice' and the 'principle of minimum sacrifice' as the foundation of a system of taxation. Different types of taxes are then examined and tested—the income tax, death duties, taxes on property, land value, monopoly value and windfalls, and customs and excise duties. The author's exceptional powers of analysis are perhaps most evident in his treatment, in the final chapter, of the proposal for a capital levy.

J. R. B.

Constitutional Law. A Brief Text with Leading and Illustrative Cases. By CHARLES W. GERSTENBERG, Professor of Constitutional Law, Brooklyn Law School of St. Lawrence University. New York: Prentice-Hall, Inc. 1926. (\$5.)

To the man who has only a strictly limited amount of time in which to study the principles of the American Constitution, this book can be safely recommended, although it is probably too technical for an English reader. The book is divided into two parts. In the first 126 pages the author summarizes the essential features of the constitution in a lucid and, as far as space permits, accurate manner. Chapter X on the Regulation of Commerce is particularly interesting. The last 436 pages contain a collection of the leading cases on Constitutional law. They are well chosen and up-to-date. Of the fifty-eight cases given, twenty-four have been decided since 1920, which illustrates both the editor's originality and the fact that this branch of the law is continually developing at the present time. In their recent book, *The Business of the Supreme Court*, Professors Frankfurter and Landis, of the Harvard Law School, point out that the United States Supreme Court is dealing more and more with questions of Constitutional law, and that its jurisdiction of common law cases is limited in practice. A study of the cases given by Professor Gerstenberg will show how correct this view is.

Professor Sir Thomas Erskine Holland, 1835-1926. By Professor W. S. HOLDSWORTH, K.C., D.C.L., F.B.A. From the Proceedings of the British Academy. Oxford: Humphrey Milford. (1s.)

PROFESSOR HOLDSWORTH has written for the British Academy a sympathetic estimate of the work of a great Oxford lawyer, the late Professor Sir Thomas Erskine Holland. He describes the great influence which Holland exercised in three main directions—International Law, Jurisprudence, and University Affairs. Though consisting of ten pages only, it is so full of precise information and so clearly marked by deep insight that it is not merely a worthy tribute but portrays an inspiring example of the manner in which a great academic lawyer can serve the law, his University, and his country.

A. D. McN.

Dictionnaire juridique, anglais-français et français-anglais.
 Par FERNAND LAURENT et GEORGES DAUMAS. Paris:
 Librairie Arthur Rousseau. (25fr.)

THIS legal dictionary is a useful book, and on the whole the work has been done well. There are, however, in the English-French section, a number of rare or obsolete terms which would better have been omitted from a dictionary as small as this one; for instance, anient (void), assythment, parage, mainour, assiser, avowry, avowterer, farleu, fine-force, inlagary, visne, water-gavil. Here are a number of slips, such as 'case-laws, n. pl.,' 'empeachment,' 'bondet warehouse,' 'disavolwal' (désaveu), 'wagrancy,' 'cat at nine tails.' The modernity of 'cat burglar'—cambrioleur par escalade—jostles with the medievalism of 'cry de pais' (cri de haro) and 'mainour' (objet volé).

A. D. McN.

International Law. By the RIGHT HON. THE EARL OF
 BIRKENHEAD. Sixth edition, by RONW MOELWYN HUGHES.
 London and Toronto: J. M. Dent & Sons, Ltd. 1927.
 (21s.)

THE new edition of Lord Birkenhead's popular work on international law will more than maintain the reputation established by its predecessors. There is evidence of careful revision throughout; the chapters on contraband and blockade have been re-written, new chapters added on the League of Nations and the Permanent Court of International Justice. Considerable additions have been made on such topics as the status of the self-governing Dominions from the international standpoint, on the subject of mandates, and a large number of other matters, which have been brought into prominence by the war, such as trade with the enemy, air navigation and wireless telegraphy.

We congratulate the learned editor on having discharged a very difficult task with great skill and discretion.

D. T. O.

The Law of Partnership. With an Appendix of Statutes and Partnership Deeds. By J. A. STRAHAN, M.A., LL.B., and N. H. OLDHAM, B.A., LL.B. Fifth edition by J. A. STRAHAN. London: Sweet & Maxwell, Ltd.

THIS book, which is constructed in the form of a commentary on the provisions of the Partnership Act, 1890, will be found useful by those who require a short but workmanlike introduction to the Study of English Partnership Law. A work of this size would not be readable if it

attempted to include more than the main principles of the subject, but in this volume constant references are made to the appropriate paragraphs of Lindley's great textbook from which the detailed rules can be obtained. It has the unusual merit for a small book that the exposition of the subject is effected for the most part by frequent and copious citations from a well selected series of decided cases. In the introductory chapter, however, a paragraph on the Roman Law of Societas is not so felicitous, for it contains certain general statements which without qualification are somewhat misleading.

J. W. C. T.

Misleading Cases in the Common Law. By A. P. HERBERT.
London: Methuen. (5s.)

THE law is a favourite object of satire by laymen. But how much better can the lawyer do it! Mr. Herbert's pen scratches its victims without inflicting any mortal injury, and no one not totally devoid of humour will bear him any ill-will. His Mr. Haddock is establishing for himself a claim to rank with John Doe and Richard Roe. May nothing happen to save him from his incurable habit of becoming a litigant! Mr. Herbert's reprint of these cases from the columns of *Punch* make a permanent addition to the lighter literature of the law, and in accordance with precedent he has obtained for the publication of his reports a very happy *imprimatur* from the Lord Chief Justice.

A. D. McN.

Thomas and Bellot's Leading Cases in Constitutional Law.
Sixth edition, by HUGH H. L. BELLOT, M.A., D.C.L. 1927.
Sweet & Maxwell, Ltd. (Price 10s. 6d.)

THE scope of constitutional law is such that to present a selection of cases which is adequate within reasonable compass is difficult. It is therefore not surprising that the present work is slowly but surely increasing in size, and now extends to 367 pages. The new edition contains sixty-five additional cases. It is distinctly debateable, however, whether the trade union cases, and more especially *Ware and De Freville v. Motor Trade Association and Others* [1921] 3 K. B. 40, are properly included within a volume of constitutional law cases, whilst *Johnstone v. Pedlar* [1921] 2 A. C. 262, with its important consequences in respect of the plea of 'act of State' against a friendly alien, is not mentioned. It is to be hoped that the next edition will include some reference to this important case. Meanwhile, Thomas's *Leading Cases* remains what it has always been—a sound complement to a textbook upon constitutional law.

G. W. K.

The Modern Law of Real Property By G. C. CHESHIRE, D.C.L.,
Fellow of Exeter College, Oxford. Second edition by the
Author. Butterworth & Co., Ltd. 1927. (£1 15s.)

TEACHING of the new Law of Property being in the experimental stage, and the process of judicial interpretation being equally tentative, it is desirable that editions of this indispensable book should not be too long lived. Dr. Cheshire's work is so well known that detailed analysis would be superfluous: we content ourselves with summarizing the statement contained in the preface to the second edition as to the alterations made in it. The scantiness of the treatment of the old law as to future interests has been remedied, and the contrast between the alternative methods of settling property under the new law, by strict settlement and trust for sale respectively, has been emphasized. Section IV of the introduction to the first edition, which was entitled 'General Tendencies of the New Legislation,' has been replaced by a somewhat longer section which gives an admirable outline of the objects and the effect of the 1925 Acts.

We plead for the omission of the word 'modern' from the title of future editions, and more particularly for the amendment of the description on the cover, *Cheshire's Modern Real Property*, for which we presume that the publishers are responsible.

Students' Property Statutes. Edited by G. R. Y. RADCLIFFE,
Fellow of New College, Oxford. Oxford University Press.
1927. (12s. 6d.)

STUDENTS are very reluctant to enter what the distinguished editor of the *Law Journal* often calls the jungle; that is, the tangle of provisions which make up the Law of Property legislation of 1925. But it is most desirable that they should take the plunge at as early a stage in their career as possible. Mr. Radcliffe has helped them to do so by making a judicious selection from the Acts, and thereby bringing first hand acquaintance with the text within the reach of both their inclination and their purse. It is a dangerous thing to undertake the task of omission, but Mr. Radcliffe has achieved it with success.

The Rating and Valuation Act, 1925 (and incorporated statutes),
with Statutory Rules and Orders, Official Circulars and
Forms, and List of new Rating Authorities. By HERBERT
DAVEY, Barrister-at-Law. London: Stevens & Sons, Ltd.
1926. (20s. net.)

AFTER a brief introduction outlining the scheme of the Act, Mr. Davey has proceeded carefully to annotate the Act itself section by section in the manner now usual in books upon a new statute. The cross-references are

abundant and accurate. The second part of the book consists of the statutes still left in force notwithstanding the new Act, a very useful collection which will enable practitioners to tell at a glance exactly what has gone and what remains. The third part contains all the Statutory Rules and Orders and many of the Ministry of Health's Circulars up to the date of the publication of Mr. Davey's book. Unfortunately the flow had not then stopped and a number of further Orders, among them such important ones as the Overseers' Order and the Machinery Order, have appeared, and this part of the book is consequently incomplete.

M. E. R.

Other books received:—

Justice and Administrative Law. By WILLIAM A. ROBSON, Ph.D., B.Sc. (Econ.) Lond. Macmillan & Co. (12s. 6d.)

Beven on Negligence. Fourth edition by W. J. BYRNE and A. D. GIBB. Sweet & Maxwell, Ltd. (£4 10s.)

Strahan's Digest of Equity. Fifth edition. Butterworth & Co. (22s. 6d.)

Forms of Individuality. By E. JORDAN. Progress Publishing Co.

Real Estate Forms. By ROBERT F. THORLEY and WM. H. STICKNEY. Prentice-Hall, Inc. (\$5.)

Walter Henry Sanborn. A testimonial volume. Saint Louis.

The Secretarial Handbook. By E. WESTBY-NUNN, B.A., LL.B. Solicitors' Law Stationery Society. (6s.)

The Indian Constitution. By DEBENDRA NATH BANERJEE, M.A. Longmans, Green & Co. (10s. 6d.)

The Ottoman Land Laws. By R. C. TUTE. (£1.)

Supplement to the Law of Income Tax. By E. M. KONSTAM. Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. (5s.)

Trade Union Law. By ARTHUR HENDERSON, B.A., LL.B. Ruskin College, Oxford.

Publication of Immunity of State Ships, and its Sequences. By N. MATSUNAMI. 1925.

How to become a Barrister. By GIBSON and WELDON. Fourth edition. London: "Law Notes" Publishing Offices. 1928. (4s. 6d. net.)

The Landlord and Tenant Act, 1927. By the EDITORS of "LAW NOTES." London: "Law Notes" Publishing Offices. 1928. (5s. net.)

The Property Statutes Up-to-Date. By H. GIBSON RAVINGTON, M.A., Oxon., and A. CLIFFORD FOUNTAINE. London: "Law Notes" Publishing Offices. 1928. (2s. 6d. net.)

The Bell Yard. No. 1. Nov., 1927. (Journal of Law Society's Law School.) Editors: R. S. T. CHORLEY, M.A., A. E. OLIVER, J. O. STRONG. London: Solicitors' Law Stationery Society, Ltd. 1927. (2s.)

The Principles of the Law of Contract and Torts, with a Short Outline of the Law of Evidence. Being Indermaur's Common Law, re-written and enlarged by A. M. WILSHERE, M.A., LL.B. Second edition. London: Sweet & Maxwell, Ltd. 1927. (£1 10s.)
